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In the Supreme Court of the United States
October Term, 1998

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Jerry K.,
Petitioner, Real Party in Interest, and Appellant

vs.

Dawn D.,
Respondent, Petitioner, and Appellee

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On Petition for a Writ of Certiorari to the
United States Supreme Court

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United States Supreme Court

Petition for Writ of Certiorari

George E. Mc Gill
120 Birmingham Drive
Suite 240
Cardiff-By-The-Sea,
CA 92007
(760) 436-1146
Counsel of Record

Henry James Koehler IV
9454 Wilshire Blvd.
Suite 207
Beverly Hills, CA
90212
(310) 247-7100
Of-Counsel

Steven F. Wingfield
8241 La Mesa Blvd.
La Mesa, CA 91941
(619) 238-1568
Of Counsel

July 4, 1998

QUESTIONS PRESENTED

Whether a state deprives a person due process, equal protection and his right to privacy under the due process clause and/or the Equal Protection Clause under the 14th Amendment to the United States Constitution and/or rights to privacy under the United States Constitution when a) a parent and child are deprived of a natural parent relationship based on the unilateral decision of one parent to exclude the other parent, when the excluded parent has come forward promptly to accept his responsibilities and preserve his liberty interests with said child; b) a woman/mother has the unilateral power to choose and dis-choose a legal man/father based on her unilateral exclusion of the biological father from a relationship with his child (a form of unclean hands prevention) by statute; c) a state's statutory scheme prevents a natural/biological father, who comes forward in a prompt fashion to preserve his liberty interests and who is unilaterally prevented from a relationship by the mother, from being deprived of a hearing to establish his paternity or visitation rights; d) a statutory scheme grants rights to a natural mother to prevent a man from having a relationship or building a relationship with to a child by merely keeping the child from contact with that man, natural father or not.

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In The Supreme Court of The United States
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Jerry K.,
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vs.
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OPINIONS BELOW

The ruling of the Trial Court, Superior Court of California, County of Riverside, of 10/28/96, against which Appellee, Dawn D., applied for a Writ of Mandate, is attached as Appendix A. The opinion of the Supreme Court of California, filed April 6, 1998, reported at Cal. 4th , is attached as Appendix B. The denial of visitation by the Trial Court, Superior Court of California, County of Riverside, of 7/1/98, is attached as Appendix C.

JURISDICTION

Jerry K., the appellant, appeals from a California Supreme Court decision, dated April 6, 1998, which held that "... application to this case of sections 7611 and 7630 [of Family Code] does not deprive him of due process... [and] to issue a writ of mandate directing respondent Superior Court of Riverside County to vacate its order denying Dawn's motion for judgment on the pleadings and to enter a new order granting the motion", which ruling

resulted in appellant being forever excluded from a hearing to establish his rights as a parent and all parental rights appertaining thereto.

In the decision of to Michael H. et al. v. Gerald D. (1989) 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91, 57 U.S.L.W. 4691, Justice Stevens cast a concurring and the deciding opinion based on his understanding that California Statute provided for reasonable visitation rights to be granted to any person, other than a parent, having an interest in the child's welfare, and a decision in Rodney F. v Karen M. (1998) 61 Cal.App.4th 233, and amended 61 Cal.App.4th 1131, (review denied Apr. 22, 1998), wherein the Appellate Court said, "That we are even deciding this case calls into question what familial stability we are preserving. . . . where all the parties know who is the biological father, there is no reason to assume the integrity of the 'family' will be in jeopardy if visitation is allowed.", Jerry K. further applied to the trial court for visitation, in order to exhaust all avenues. On July 1, 1998, the Superior Court of California, County of Riverside, did deny such motion for visitation.

The judgment of the Supreme Court of the State of California granting the Appellee's Writ of Mandate for judgment on the pleadings was filed on April 6, 1998. A notice of Appeal was sent to the Supreme Court of the State of California on July 3, 1998.

This appeal is being docketed in this Court within 90 days from the judgment below. The

jurisdiction of this court is invoked under 28 U.S.C. section 1257. The provisions of 28 U.S.C. section 2403 may be applicable.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States

AMENDMENT XIV

Section 1. [Citizenship - Due process of law - Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California State Constitution § 7.

Due process; Equal protection; Privileges and immunities

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other

provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th amendment of the United States Constitution.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

Family Code § 7540.

Except as provided in Section 7541 , the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

§ 7541. Use of blood tests to determine paternity

(a) Notwithstanding Section 7540 , if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(b) The notice of motion for blood tests under this section may be filed not later than two years from the child's date of birth by the husband, or for the purposes of establishing paternity by the presumed father or the child through or by the child's guardian ad litem. As used in this subdivision,

"presumed father" has the meaning given in Sections 7611 and 7612.

(c) The notice of motion for blood tests under this section may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(d) The notice of motion for blood tests pursuant to this section shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court.

(e) Subdivision (a) does not apply in any of the following cases:

(1) A case which reached final judgment of paternity on or before September 30, 1980.

(2) A case coming within Section 7613.

(3) A case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

§ 7550. Short title

This chapter may be cited as the Uniform Act on Blood Tests to Determine Paternity.

§ 7551. Order for genetic tests in civil proceeding involving paternity; "Genetic tests"

In a civil action or proceeding in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person who is involved, and shall upon motion of any party to the action or proceeding made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to genetic tests. If a party refuses to submit to the tests, the court may resolve the question of paternity against that party or enforce its order if the rights of others and the interests of justice so require. A party' s

refusal to submit to the tests is admissible in evidence in any proceeding to determine paternity. For the purposes of this chapter, "genetic tests" means any genetic test that is generally acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Services.

§ 7554. Effect of test results

(a) If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly.

(b) If the experts disagree in their findings or conclusions, or if the tests show the probability of the alleged father's paternity, the question, subject to Section 352 of the Evidence Code, shall be submitted upon all the evidence, including evidence based upon the tests.

§ 7600. Citation of part

This part may be cited as the Uniform Parentage Act.

§ 7610. Methods of establishing

The parent and child relationship may be established as follows:

(a) Between a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part.

(b) Between a child and the natural father, it may be established under this part.

(c) Between a child and an adoptive parent, it may be established by proof of adoption.

§ 7611. Presumption of paternity

A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following

subdivisions:

(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child's father on the child's birth certificate.

(2) He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child.

(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is

the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

§ 7630. Persons who may bring action; When action may be brought

(a) A child, the child's natural mother, or a man presumed to be the child's father under subdivision (a), (b), or (c) of Section 7611, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under subdivision (d) of Section 7611.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if

the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664.

§ 7631. Action by man not presumed father to establish paternity

Except as to cases coming within Chapter 1 (commencing with Section 7540) of Part 2, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7611, if the mother relinquishes for, consents to, or proposes to relinquish for or consent to, the adoption of the child. An action under this section shall be brought within 30 days after (1) the man is served as prescribed in Section 7666 with a notice that he is or could be the father of the child or (2) the birth of the child, whichever is later. The commencement of the action suspends a pending proceeding in connection with the adoption of the child until a judgment in the action is final.

STATEMENT OF THE CASE RAISING THE FEDERAL QUESTION

The appellee requested a judgment on the pleadings in the Trial Court. The trial court found that appellant had due process liberty interests in establishing a relationship with his child as he has "promptly come forward and demonstrated a full commitment to his parental responsibilities." The trial court found that in a balance of "the interests of the father against the interests of the state", since father and mother were cohabiting at time of conception, that conclusive presumption of paternity did not fall to the husband and "it can be implied

that the legislature perceived a decreased threat to the family stability." The court ruled the appellee's "Motion for Judgment on the Pleadings is denied" and granted blood tests and further hearing for child custody and visitation.

The appellee petitioned the Appellate Court for a Writ of Mandate for Judgment on the Pleadings and was denied.

The appellee petitioned the Supreme Court of the State of California for the Writ of mandate, which was granted on April 6, 1998, holding that the appellant had no due process rights to establish paternity, petition for child custody or visitation hearings, and thereby terminated all parental rights of the biological father. The appellant argued his due process liberty interests and his claims of equal protection under the law and Constitutions of the State of California and the Constitution of the United States. The Supreme Court considered and rejected appellant's constitutional claims and granted a Writ of Mandate for Judgment on the Pleadings in a split decision, the question of due process claims troubling two of the Justices in a written dissent.

Around November of 1994, Jerry K. and Dawn D. met on jury duty and became friends. On or about January 6, 1995, Dawn D. moved in and began cohabiting with Jerry K. There was talk of their getting married as soon as they were able and of her getting pregnant and having a child. There was a mutual agreement. Dawn D. announced she was pregnant in March of 1995 after a pregnancy test. On April 8, 1995, Dawn D. moved out of Jerry K.'s home and moved in with her parents, going back to her husband later.

Jerry K. immediately began negotiations for

parental rights to visitation and a custody share with the as yet unborn child, promising support both financially and emotionally. Negotiations broke off and Jerry K. filed a Summons and Petition for Paternity on or about August 17, 1995. Negotiations continued between attorneys. The child was born on November 9, 1995. An agreement was reached to schedule a blood test to establish paternity and Dawn D., her husband and the child showed up on May 1, 1996 for a blood test. Instead the husband physically attacked Jerry K. and charges were filed. Negotiations broke off. A court date was set, and a hearing was held. Dawn D. was relying upon Family Code section 7540 which states that "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." The court found that Dawn D. was separated and not cohabiting with her husband during conception; hence, the conclusive presumption was not applicable. The trial court found that Jerry K. had preserved his interests in the child, came forward promptly and "demonstrated a full commitment to his parental responsibilities." The trial court found that there had been an agreement "reached for visitation and payment of child support." The trial court found Jerry K. had due process rights and that in balancing the individual interests with the state's interests, that "the legislature perceived a decreased threat to the family stability if a wife is not cohabiting with her husband at the time of conception." The trial court ruled on October 28, 1996 that Judgment on the Pleadings was denied, that Jerry K. had preserved his due process liberty interests and could attempt to establish paternity through a genetic blood test, with further hearings scheduled upon the completion of the tests.

The appellee filed for a Writ of Mandate with the

4th *District Court odf Appeal of the State of California* and requested a Stay, which Stay was granted. Appellant responded, the Writ was denied. Appellant applied to the trial court for an order for the genetic blood tests to be taken and for a hearing to be scheduled. Test results reflected a 98.6% probability of paternity.

Appellee applied for a Writ of Mandate and a Stay was granted. Appellant, Jerry K., argued that he had a due process liberty interest and that the California statutory scheme is unconstitutional because it denies him due process hearing and/or equal protection as a father. On April 6, 1998, the Supreme Court granted the Writ of Mandate for Judgment on the Pleadings and held that Jerry K. cannot establish a constitutionally protected liberty interest in being allowed to form a parental relationship with the minor child. The Court essentially allowed appellee the unilateral ability to keep Jerry K. from establishing a relationship with the child. Based upon that behavior, Jerry K. was prevented from getting even getting a hearing to allow contact or to establish a relationship.

In Michael H. et al. v Gerald D. (1989) 491 U.S. 110, 109 S.Ct. 2333, Justice Stevens believed that visitation was available to any person with an interest in the child. In Rodney F. v Karen M. (1998) 61 Cal.App.4th 233, and amended 61 Cal.App.4th 1131, the Second District Appellate Court stated that visitation is appropriate in circumstances such as these. Jerry K. filed an Order to Show Cause for visitation, and was denied on July 1, 1998. The last avenue for relationship with his child was exhausted.

REASONS FOR GRANTING THE QUESTIONS ARE SUBSTANTIAL

a. Equal Protection

The equal protection clause of the Constitution requires that legislation operate equally upon all members of a group, in this case upon biological parents. However mothers are afforded almost total control of the parental choice, being able to choose and dischoose the father at her fickle whim and fancy. The California statute which allows the mother to deny the biological father entrance to a relationship with his child based simply on her unwillingness to allow access to the father casts an unusual burden and impossible burden on the father and the child to have a relationship with each other. Mother can simply refuse marriage, or simply deny access to a father so he may not take the child into his home and hold the child out as his own.

The mother in the instant case argued that the state has an interest in upholding the child's welfare and stability of a marital family. In the dissent Justice Chin examined these issues and found mother's argument lacking. "[O]n the facts of this case, they do not justify the state's categorical presumption that Jerry's exclusion from the child's life is warranted and its refusal to afford Jerry a hearing on the matter."

In order for the state's interests to override a personal interest there must be an overwhelming state interest that needs to be preserved.. In Caban v Mohammed (1979) 441 U.S. 380, 99 S.Ct. 1760, the Court determined that the sex based distinction bore no substantial relationship to any important state interest, and as such, was in violation of Constitutional equal protection principles, in an adoption scheme that required only a mother's consent for an adoption and not a father's. It is

similar here, the mother is invested with a measure of control and unilateral veto power upon paternity by simply withholding her hand in marriage or by saying no to father's access to the child for no reason other than her own personal choice, be it invidious, vindictive or magnanimous. Father is afforded no like control or exercise. Mother need not show detriment to the child by the relationship, nor the best interests of the child in precluding such parental relationship for the father. The legislation clearly discriminates against fathers based on their gender and does not hold mothers to equal standards.

When fundamental rights are involved even a rational relationship between the regulation and a permissible legislative purpose may not be sufficient to uphold the regulation. Such regulation will stand only if it is "necessary to promote a compelling governmental interest." Shapiro v Thompson (1969) 394 U.S. 618, 89 S.Ct. 1322. In a case where the biological father has come forward promptly to accept his responsibilities, mother's unilateral reluctance to prevent such relationship does not rise to the level of an overwhelming state interest in preventing such a relationship. In fact, it would seem that it would be quite the contrary. The state has found a well of support for the child, the very basis for the paternity statutes in the first place - that the child have a mainstay of support both financial and emotional that the child may grow well in society and not be a drain on the Public dole or resources. It is clear that the court and the California statutory scheme treat the biological parents differently based on sex. In fact it encourages mother when she does not want to play fairly with father or child. She only needs to refuse biological father access and substitute some non-biological man in his place to prevent biological of his paternal rights and the child of a biological father.

The statutory scheme of the California Family Code is the source for possible great harm to the child. Mother can unilaterally deny the child a natural father. She can substitute another man in his place, a man who does not necessarily have the best interests of the child in mind. He can be a party who only wishes to visit vindictive or misguided harm and/or punishment on the natural father. He can be substituted and not be able or willing to offer the financial or emotional support that the child needs.

Mother can use this substitute for the purpose of displacing natural father and later opt for a blood test of this substitute and disqualify him as father and thereby create a totally legally fatherless child who is now denied forever the support necessary for healthy growth. Further mother can set out on a path of fraud for the fathers - natural and selected - and the child for her own selective and misguided purposes.

In a similar type scheme of unilateral control over a child by a mother under Georgia law re: adoption, Quilloin v Walcott (1978) 434 U.S. 246, 98 S.Ct. 549, Georgia law permits a father veto power over unilateral control and decision making by only petitioning the court to legitimate his child, the very thing that is lacking in the California statutory scheme. In fact, as in this case, the mother holds all the power to prevent such legitimation by the natural father. There is no basis for the underlying assumption that only a father who has undertaken the bonds of marriage or who has provided a common home may have a natural parental interest and so constitutionally protected liberty interests. In fact a father who comes forward, and in this case even before the birth of the child, to establish paternity, accept the obligations financially for the child and attempt to gain a custodial or

visitation position with the child is demonstrating his concern and interest.

In the instant case there can be no plea that the extant family needs to be protected by the fiction of husband-dad vs bio-dad in that the biological father was cohabiting with mother at time of conception and he came forward promptly to accept his responsibilities and preserve his Constitutional privacy and liberty interests before birth of the child. There is no overwhelming state interest to preserve this kind of marriage when, as the trial court found, mother was not living with her husband at time of conception. The Quilloin Court, supra, premised its decision to forever terminate biological father's rights on the fact that father never came forward for over a period of eleven years to preserve his interest or accept his responsibilities. The Caban Court stated: "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause Precludes the State form withholding from him the privilege . . ." Biological father appellant herein did come forward, promptly and before the child was born. So there was no extant family to protect, no relationship to protect. Biological father and mother did announce to the world that the child was his at the time of discovery of pregnancy. Biological Father would have been successful in maintaining a relationship, taking the child into his home and holding it out as his own had mother not unilaterally withheld such opportunity for her own whimsical and fickle personal reasons. Such ability is not available equally to both parents, nor should such unclean hands be allowed if it were.

The California statutory scheme can be and is used in this case to interfere with the parental relationship so necessary for the proper development of the child and

as such is contrary to the very spirit of the Uniform Parentage Act. The California statutes therefor are contrary to both of these interests. They are in direct contravention to the establishment of the parent-child relationship envisioned by the Act. In fact the only time a biological non-presumed father has the right to bring an action to declare his natural fatherhood is if the mother relinquishes or proposes to relinquish or consent to an adoption.

Can the mother deny a father a father any opportunity to live in a de facto relationship with the child and thereby prevent father and child from having any rights at all? How is father to take the opportunity, how is he to accept the responsibilities for the child? This position affords mother unequal protection, unequal rights to the father by its unilateral allowance for the prevention of a father-child relationship.

b. Due Process

The Trial Court granted to the Jerry K. the opportunity to have a hearing based on his prompt coming forward to accept his responsibilities. The Supreme Court said he has no such due process right to establish his paternity and granted Judgment on the Pleadings. The Trial Court found that mother was not credible in her claim of cohabitation with her husband at the time of conception and the Supreme Court did not challenge the findings.

Jerry K. came forward promptly to preserve his rights to a hearing. Mother and Jerry K. had even entered into an agreement at one point which she then capriciously decided not to honor making only the court an available remedy to Jerry K to establish a relationship with his child. There was nothing more Jerry K. could have done, as the Trial Court found when it granted Jerry K.'s petition.

The due process clause of the Fourteenth Amendment to the Constitution of the United States provides that no "state shall deprive any person of life, liberty, or property, without due process of law. . . ." (U.S. Constitution, 14th Amendment section 1) Of course there is more to due process than procedure, there are substantive protections of certain liberties from state intervention except for compelling reasons. There are no such compelling reasons here. In fact, in the Michael H. et al. v Gerald D. (1989) 491 U.S. 110, 109 S.Ct. 2333, Justices O'Connor and Kennedy expressed the view that no single mode of historical analysis, as imposed by Justice Scalia in his opinion, should be imposed when identifying due process liberty interests. Justice Stevens found that due process had not been violated by the statutory scheme of irrebutable presumption of paternity because visitation was available to any person, other than a parent, having an interest in the child's welfare (which visitation is not available, but was based on a mis-reading of the California statutory scheme.) Justice Brennan, joined by Justices Marshall and Blackmun, expressed the view that the statutory scheme of the presumption statute was unconstitutional and the flaw in the statute was the kind that procedural due process was designed to correct and violated procedural due process rights. Justice White expressed the view that an unwed father who has demonstrated a sufficient commitment to his paternity has a protected liberty interest in a relationship with his child, that the presumption statute of the California scheme was not justified by the states interests and that procedural due process rights were violated by the denial of any meaningful opportunity to be heard in order to establish paternity. The score is 7-2 that there may be some due process rights involved. It follows that this case stands for the position that the United States Supreme Court will not -

foreclose the possibility that a natural father might ever have an interest protected by the Federal Constitution in his relationship with his child. Only due process was before the court and equal protection was not.

The Uniform Parentage Act aims to eliminate any differentiation between a married and an unmarried parent's legal relationship with the child. "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." (Uniform parentage Act section 2, 9B U.L.A. 295, 296.) This position over-rides any State statutory scheme to the opposite in spirit and in fact.

Since the advent of the Uniform Parentage Act many statutes that discriminated against the children of unwed parents have been ruled unconstitutional. (Harry D. Krause, The Uniform Parentage Act, 8 Fam. L.Q. 1, 6-8 [1974])

Within a year after the Michael H. case, supra, the California Courts refused to apply a conclusive presumption to prevent natural fathers to establish paternity in In Re Melissa G. (1989) 213 Cal.App.3d 1082, 261 Cal.Rptr. 894, on Constitutional grounds and in In Re the Guardianship of Ethan S. (1990) 221 Cal.App.3d 1403, 271 Cal.Rptr. 121, on grounds of equitable estoppel. In 1990, the law of conclusive presumption was changed to allow for parent-child relationships.

In the instant case there would have been a parent-child relationship if the natural father had been allowed a court hearing to establish his paternity and petition for such a custodial position. It would have existed de facto had mother not unilaterally decided to prevent such. After such unclean hands prevention, mother relies on the absence of this relationship to prevent the establishment of

paternity. The court allowed such unclean hands to serve as a bar to a court hearing.

The fundamental right to a day in court to establish such a fundamental right as a paternal relationship is more important than any unilateral capricious maternal desire to prevent father-child relationship. Father has a procedural due process right that has been denied and must be reinstated. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' Caban, supra, his interest in personal contact with his child acquires substantial protection under the due process clause." Smith v Organization of Foster Families for Equality and Reform (1977) 431 U.S. 816, 97 S.Ct. 2094. Quoting Wisconsin v Yoder (1972) 406 U.S. 205, 92 S.Ct. 1526. "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." Lehr v Robertson 463 U.S. 248, 103 S.Ct. 2985. Thus it is obvious that the important question of the unwed father's rights regarding his child has substantial protection under the due process clause.

The California Courts have recognized a father's due process rights before:

> "The private interest here, that of a man in the children he has sired and raised, undeniably

warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '[r]ights far more precious ... than property rights,' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra., at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra., at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

"Nor has the law refused to recognize those family relationships unlegitimized by a marriage

ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana, 391 U.S. 68, 71-72 (1968). 'To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.' Glona v. American Guarantee Co., 391 U.S. 73, 75-76 (1968). In re Kelvin M. (1978) 77 Cal.App.3d 396, 143 Cal.Rptr. 561

California has recognized a genetic father's due process rights, *Johnson v Calvert* (1993) 5 Cal.4th 84, Adoption of Kelsey S., (1992) 1 Cal.4th 816.

Here the natural father is being prevented from even having his day in court, procedural due process rights, to attempt to establish his parental status and accept the rights and responsibilities of fathering a child. Where interests of such Constitutional importance are involved, the very fundamental rights of a father and child to a father-child relationship, there is no foundation for a state to prevent such, and certainly not in such instances as this.

c. Unilateral power is not equal or due process

Under the California statutory scheme the natural father of a child has no rights unless the mother decides to allow it. Mother can even give the child away to others

without his consent and even over his objections with no hearing, as mother has, in essence, done here by excluding Jerry K. and giving the child to her husband. It is not necessary to recite the litany of abuses that can arise from this ability for mother to exercise unilateral power through anger, vindictiveness, fraud, or even misguided conceptions of good intentions.

In the Adoption of Marie R. (1978) 79 Cal.App.3d 624, 145 Cal.Rptr. 122, the trial court found that the presumed father constructively received the baby as his own, although actual receipt of the baby, whom the presumed father had never seen, was prevented by the mother. The Court of Appeal reversed since there was no actual contact, however minimal, between the man claiming to be the father and the child holding that absent this minimal contact, there can be no receipt, constructive or otherwise, into the home of a purported father, despite the fact that his attempts at contact with the child were refused by the mother.

In Jermstad v. McNelis (1989) 210 Cal.App.3d 528, 258 Cal.Rptr. 519, the trial court allowed the father access to his child and stated orally that the father had equal rights with the mother. On that basis, it awarded him custody. If the trial court . . . deems it to be in the best interest of the child it may grant sufficient custody to the natural father to permit him to receive the child into his home and openly hold out the child as his natural child. This will result in the natural father acquiring the status of a presumed father. . . Despite the wishes of the mother, under the Uniform Parentage Act the natural father may acquire the status of a presumed father. (at p. 543).

Here we have a father who is prevented from receipt of the child into his home which the Supreme Court uses to deny him any parental rights at all. However, with

a perusal of the above decisions, his coming forward promptly, as the trial court found, should entitle him to constructive receipt and as such give him standing under the federal Uniform Parentage Act.

Several states have dealt with this problem and have decided that a mother does not have a unilateral right to prevent a father from a relationship with his child and then rely on that prevention to deny him status as a father, that fathers have Constitutional rights whether mothers like it or not.

In Idaho, in In Re Steve B.D., (1986) 112 Idaho 22, 730 P.2d 942, the Supreme Court of that state found two constitutional rights of unwed fathers: to enjoy established relationships with their children and to form relationships with their children. The court believed that the inchoate interest in establishing a relationship could not be denied by the state.

In Georgia, the Georgia Supreme Court concluded that unmarried fathers have a constitutionally protected opportunity interest to develop a relationship with their children, that this interest begins at conception and probably lasts through the minority of the child. In Re Baby Girl Eason, (1987) 257 Ga. 292, 358 S.E.2d 459.

In Louisiana, the Louisiana Supreme Court considered the question of a father's Constitutional guaranteed right in In Re Adoption of B.G.S. (1990) 556 So.2d 545. The Court held that "a fully committed unwed father of a newborn child has a Constitutionally protected interest in his opportunity to develop a mutually beneficial emotional or psychological bond with his child" (at 550) and rejected the interpretation of Lehr (supra) and Stanley v. Illinois (1972) 405 U.S. 645 that only an unwed father with a developed relationship with his child may have a constitutionally protected interest in parenthood, that, for

the father of a newborn, the requirement is "coming forward to participate in the rearing of his child" (quoting Lehr, 463 U.S. at 261 and Caban, 441 U.S. at 392.) The court further found further, applying the test of Mathews v. Eldridge (1976) 424 U.S. 319, that the "risk of an erroneous deprivation of such an interest is not insubstantial, given the statute's complete reliance upon the natural mother to decide whether the natural father shall be notified or consulted prior to the termination of his interest." (In Re Adoption of B.G.S. (1990) 556 So.2d 545, 553.)

In New York, in In the Matter of Raquel Marie X. (1990) 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 885, cert.den. 111 S.Ct. 517, the court found that a living together arrangement was rejected since it "can easily be used to block the father's rights. But even more significantly, it permits adoption despite the father's prompt objection even when he wishes to form or actual has attempted to form a relationship with the infant that would satisfy the State as substantial, continuous and meaningful by any other standard." (Id. at 405, 559 N.E.2d at 426, 559 N.Y.S.2d at 863) the court struck down the statute as unconstitutional.

Here Jerry K. has been prevented from asserting his rights and relationship with his child merely be a unilateral decision of the mother to deny Jerry access to his child, and, such action is supported by statute. His Constitutional rights to Due Process and Equal Protection are denied by the unclean hands of the mother.

At least 20 States believe that fathers in Jerry K's position are entitled to some form of hearing before they are excluded from the lives of their biological children. (*R.A.J. v. L.B.V.* (Ariz.Ct.App. 1991) 817 P.2d 37; *Willmon v. Hunter* (Ark. 1988) 761 S.W.2d 924; *R. McG.*

v. J. W. (Colo. 1980) 615 P.2d 666; *Weidenbacher v. Duclos* (Conn. 1995) 661 A.2d 988; *Green v. Long* (Del. Fam.Ct. 1988) 547 A.2d 630; *Johnson v. Studley-Preston* (Idaho 1991) 812 P.2d 1216, 1219-1221; *Simcox v. Simcox* (Ill. 1989) 546 N.E.2d 609, 612; *In re Marriage of Slayton* (Ill.App.Ct. 1996) 660 N.E.2d 562; *K.S. v. R.S.* (Ind. 1996) 669 N.E.2d 399; *Smith v. Jones* (La.Ct.App. 1990) 566 So.2d 408; *Finnerty v. Boyett* (La.Ct.App. 1985) 469 So.2d 287; *Turner v. Whisted* (Md. 1992) 607 A.2d 935; *In re Paternity of B.J.H.* (Minn.Ct.App. 1998) 573 N.W.2d 99; *Kelly v. Cataldo* (Minn.Ct.App. 1992) 488 N.W.2d 822, 826-828; *Ivy v. Harrington* (Miss. 1994) 644 So.2d 1218; *J.M.L. v. C.L.* (Mo.Ct.App. 1976) 536 S.W.2d 944, 945-947; *Matter of Paternity of Adam* (Mont. 1995) 903 P.2d 207; *M.F. v. N.H.* (N.J. Super.Ct. App.Div. 1991) 599 A.2d 1297; *Richard W v. Roberta Y* (N.Y. App.Div. 1995) 629 N.Y.S.2d 512; *Gorton v. Gorton* (N.Y. Fam.Ct. 1984) 475 N.Y.S.2d 767; *Gregory v. McLemore* (Okla.Ct.App. 1995) 899 P.2d 1189; *In Interest of J.W.T.* (Tex. 1994) 872 S.W.2d 189; *McDaniels v. Carlson* (Wash. 1987) 738 P.2d 254; *In re Paternity of T.R.B.* (Wis.Ct.App. 1990) 454 N.W.2d 561; see also *C.C. v. A.B.* (Mass. 1990) 550 N.E.2d 365, 372, fn. 10 (leaving open possibility of action "where, due to the actions of the mother, [the natural father] ha[s] not yet formed a substantial relationship with the child"); *Stone*, *supra*, 474 S.E.2d at page 566 (leaving open possibility of action where natural father "proves that he would share in the care of, responsibility for, and support of the child but for the mother's repudiation").

Several of the Justices of the Supreme Court have been among the main believers in due process rights - Justices Breyer, Suter and Kennedy, in their own right.

Justice O'Connor wrote the opinions finding that a statute of limitations re: paternity issues are unconstitutional. Justice Ginsberg has been primary in the rights of Equal Protection.

CONCLUSIONS

There are substantial and very distinct constitutional liberty interests of equal protection and due process that are at stake here. These questions do not only involve the interests of the father herein but also the liberty interests of the child, whose interests are not being represented herein except by the natural father. All over this country, the plight of fatherless children and the absence of fathers from the homes and lives of their children are being decried. California has a problem of epidemic proportions in the amount of unwed births per year, of children going to bed in homes absent of their natural father. And this problem is not much less in other cities and states in the United States today. Here we have a father who has come forward to accept the rights and responsibilities of fatherhood and he is being prevented from doing so by the unilateral capricious and fickle decision of mother. Mother is being supported by a statutory scheme that not only prevents the natural father from a relationship with his child - equal protection but also even prevents him from a day in court - procedural due process.

In fact the only way a natural father who has been denied access to the courts to bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under section 7611 of the Family Code is if the mother relinquishes for, consents to, or proposes to relinquish or consent to, the adoption of the child. Certainly this is a most blatant statutory scheme for

the denial of due process, lack of equal protection under the law, and lack of right to privacy in procreation and life.

There have been a few overwhelming Supreme Court cases on the issue of Due Process - Pickett v Brown (1983) 462 U.S. 1, and Clark v Jeter (1988) 486 U.S. 456. California used to recognize due process rights - In Re Angelia P. (1981) 28 Cal.3d 908, and In Re Roger S. (1977) 19 Cal.3d 921. Equal Protection has been important to this Court in Harris v Mc Crae (1980) 448 U.S. 297 and Plyler v Doe (1982) U.S. 202. In California, a mother was not allowed to lose her child to a married father under the exact reverse circumstances in Brasher v Brasher (1967) 253 Cal,App.2 867. Susan v Priest (1976) 18 C

The petition for a Writ of Certiorari .should be granted.

Dated: July 4, 1998

Respectfully submitted,

George Mc Gill, Esq.
120 Birmingham Dr., Suite 240
Cardiff-by-the Sea, CA 92007
(760) 436-1146

Henry James Koehler IV (Of Counsel)
Law Offices of Henry James Koehler IV
9454 Wilshire Blvd., Suite 207
Beverly Hills, CA 90212

Steven F. Wingfield (Of Counsel)
8241 La Mesa Blvd.
La Mesa, Ca 91941
(619) 238-1568

Appendix A

Appendix "A"

Title: JERRY KRCHMAR v DAWN ELIZABETH DEZERN Date: 10/28/96 D-157628

RULING ON SUBMITTED MATTER

Defendant and her husband, Frank Farkas were married in June 1989. In early January, 1995. Defendant separated from her husband and began living in a household with Plaintiff. In February 1995, Defendant became pregnant. In April, 1995, Defendant moved out of the home with Plaintiff and recommenced living with her husband. On August 18, 1995, Plaintiff filed the complaint in this action to establish his relationship with an as yet unborn child. A child was born to Defendant on 11/9/95, and that child is residing, and has resided, with Defendant and her husband since that time. Between December, 1995, and April, 1996, the parties through counsel, agreed to participate in paternity testing, although Defendant now refuses to voluntarily test for paternity.

On 7/18196 Plaintiff filed a Notice of Motion for child custody, visitation and for blood testing.. On 8/27/96, Defendant filed a Notice of Motion for Judgment on the Pleadings. The matters were argued on 10/8/96 and the matter deemed submitted. Plaintiff s counsel made a timely request for a Statement of Decision.

The gravamen of Defendant's Motion for Judgment on the Pleadings's that Plaintiff has no standing to allege paternity since her husband, Frank Farkas, is a presumed father.

"Family Code ° 7540. Presumption arising from birth of child during marriage Except as provided in Section 7541 , the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

The presumption under this code section is not applicable. There is no evidence that Defendant's husband was impotent or sterile at the time the child was conceived, however, the court finds that Defendant was not cohabiting with her husband at the time the child at issue was conceived. It is clear that Defendant and her husband had separated and that Defendant was cohabiting with Plaintiff during the time that the child was conceived.

Family Code Section 7541 applies to use of blood tests to rebut the presumption under Family Code Section 7540.

"Family Code ° 7541. Use of blood tests to determine paternity

(a) Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(b) The notice of motion for blood tests under this section may be filed not later than two years from the child's date of birth by the husband, or for the purposes of establishing paternity by the presumed father

or by the child's guardian ad litem. As used in this subdivision, "presumed father" has the meaning given in Sections 7611 and 7612.

(c) The notice of motion for blood tests under this section may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(d) The notice of motion for blood tests pursuant to this section shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court.

(e) Subdivision (a) does not apply in any of the following cases:

(1) A case which reached final judgment of paternity on or before September 30, 1980.

(2) A case coming within Section 7613.

(3) A case in which the wife, with the consent of the husband, conceived by means of a surgical procedure."

If the presumption of Family Code Section 7540 does not apply, then paternity must be determined pursuant to the Uniform Parentage Act, commencing at Family code Section 7600.

~ Family Code Section 7611 provides for a presumption of paternity in certain circumstances.

" 7611. Presumption of paternity

A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:

(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a

court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child's father on the child's birth certificate.

(2)He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child.

(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative. (Bolding added)."

In the case at hand, Defendant's husband is a presumed father pursuant to Family Code Section 7611 (a) and (d), since the child was born while Defendant and her husband were married, and Mr.

Farkas has received the child into his home and held out the child as his natural child.

It does not appear that Plaintiff is in any of those classes defined under FC 7611, and therefore cannot be classified as a presumed father.

The presumptions raised (with the exception of that presumption under FC § 7540) are presumptions affecting the burden of proof, and may be rebutted by clear and convincing evidence.

"Family Code § 7612. Rebuttal of paternity presumption; Controlling presumption

(a) Except as provided in Chapter 1 (commencing with Section 7540) and Chapter 3 (commencing with Section 7570) of Part 2 or in Section 20102, a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate. action only by clear and convincing evidence.

(b) If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.

(c) The presumption under Section 7611 is rebutted by a judgment establishing paternity of the child by another man.".

Family. Code Section 7630 provides control over who may bring an action to establish paternity.

" 7630. Persons who may bring action; When action

may be brought

(a) A child, the child's natural mother, or a man presumed to be the child's father under subdivision (a), (b), or (c) of Section 7611, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under subdivision (a)' (b), or (c) of Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under subdivision (d) of Section 7611.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal

representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664."

Defendant cites the court to Michael M. V. Giovanna F., (1992) 5 Cal.App.4th 1272, in support of her position. The facts in that case are somewhat similar to those in this case. In Michael M. V. Giovanna F., In that case the child was conceived by the mother and biological father prior to the mother marrying her husband. Int the present case the child was conceived while Defendant and her wife were separated after marriage.

Defendant correctly cites a headnote in In Michael M. V. Giovanna F., in its finding that under what is now Family Code Sections 7630 & 7611, the Plaintiff had no standing to sue for a declaration of paternity, since there was another presumed father and Plaintiff had been unable to take the child into his home and hold it out as his own.
Defendant,.however, has apparently failed to read the text of the opinion in that case. The court in In Michael M. V. Giovanna F. stated "We therefore hold that where unwed parents conceive, and the

mother marries another before the birth of the child, the biological father's substantive due process right to a relationship with his child requires that he be allowed standing under the UPA to attempt to establish his paternity of the child, so long as he has promptly taken sufficient steps to preserve his interest."

This due process issue was also addressed in the context of an adoption case, relative to the rights of a non-presumed parent to object to an adoption. The California Supreme Court in Adoption of Michael H.. (1995) l0 Cal.4th 1043, 1052, restated its holding in Adoption of Kelsey S. (1992) 1 Cal.4th 816 in stating "that an unwed father who has no statutory right to block a third party adoption by withholding consent may nevertheless have a constitutional right to do so under the due process and equal protection clauses of the Fourteenth Amendment and thereby to preserve his opportunity to develop a parental relationship with his child. Under such circumstances,. however, the unwed father's constitutional interest is merely inchoate (Lehr v. Robertson (1983) 463 U.S. 248, 261-263 [77 LEd.2d 614, 626-628, 103 S.Ct. 2985]) and does not ripen into a constitutional right that he can assert to prevent adoption unless he proves that he has "promptly come[] forward and demonstrated] a full commitment to his parental responsibilities..." (Kelsey S., supra, I Cal. 4th 816, 849.)

It is hard to imagine what else the Plaintiff could have done under these circumstances to

"preserve his interest" in this case and to prove that he has'"promptly come forward and demonstrated a full commitment to his parental responsibilities". Plaintiff filed the within action to determine parentage prior to the birth of the child. Once he learned that the child was born, he began negotiations with Defendant for blood testing, payment of child support and visitation. It would appear from correspondence between counsel that an agreement had been reached for visitation and payment of child support.. It also appears that Plaintiff took a parenting class which was completed on 1217/95 in preparation for the birth of the child and his anticipated parental duties.

The analysis does not end there however. After determining that the defendatn has due process rights, the court must then balance the interests of the father against the interests of the state. The state has a continuing interest in the welfare of the child and in "familial stability" (citations omitted) Michael M. V. Giovanna F.. supra. In the case at hand, the child was conceived while Defendant and her husband were living separate and apart, and while the Defendant was living with Plaintiff. After Defendant became pregnant, she recommenced living with her husband, apparently with the knowledge that she was pregnant As noted earlier, this is not a situation that falls under the conclusive presumption of Family Code Section 7540. Certainly under those circumstance, the legislature has indicated an intention to

place a strong emphasis on family stability, which would allow parentage to be challenged only in exceptional circumstances by someone other than the husband and wife. Since Family Code Section 7540 applies only "to a child of the wife cohabiting with her husband", it can be implied that the legislature perceived a decreased threat to the family stability if a wife is not cohabiting with her husband at the time of the conception.

Under these circumstances the court finds that Plaintiff should be allowed to attempt to establish that he is the biological father of the minor child.

THE COURT RULES:

1. Defendant's Motion for Judgment on the Pleadings is denied.

2. Plaintiffs Motion for Blood Tests is granted. Each party and the minor child shall participate in parentage testing through the Long Beach Genetics,. Counsel for Plaintiff shall arrange for the testing and communicate those arrangements to counsel for Defendant. Plaintiff shall advance the costs of the testing subject to allocation at subsequent hearing or time of trial.

3. Further hearing on Plaintiff's Motion for child

custody, visitation and attorney's fees and costs is continued to January 3, 1997 at 7:30 a.m. in Dept F3.

4. The clerk of the court is directed to mail a copy of this Ruling on Submitted Matter/Statement of Decision to counel.

MINUTES OF SUPERIOR COURT

Appendix B

Filed 4/6/98

IN THE SUPREME COURT OF CALIFORNIA

DAWN D.,

Petitioner,

v.
THE SUPERIOR COURT
OF RIVERSIDE COUNTY,
Riverside
Respondent;

JERRY K.,

Real Party in Interest.

S060966

Ct. App. 4/2 E019631

Super. Ct. No. D-157628

In this case we determine whether the presumption

created by Family Code section 7611[1] and the standing

[1] Family Code section 7611 provides: "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with section 7540) or Chapter 3 (commencing with section 7570 [establishment of paternity by voluntary declaration]) of Part 2 or in any of the following subdivisions: [¶] *(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.* [¶] (b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. [¶] (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. [¶] (c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage

(continued...)

rule embodied in section

7630[1] constitutionally may be applied to preclude an

(...continued)
solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) With his consent, he is named as the child's father on the child's birth certificate. [¶] (2) He is obligated to support the child under a written voluntary promise or by court order. [¶] *(d) He receives the child into his home and openly holds out the child as his natural child.* [¶] (e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative." (Italics added.)

All further statutory citations are to the Family Code unless otherwise specified.

Section 7630, subdivision (a), provides: "A child, the child's natural mother, or a man presumed to be the child's father under subdivision (a), (b), or (c) of Section 7611, may bring an action as follows: [¶] (1) At any time for the purpose of declaring the

(continued...)

alleged biological father from establishing his paternity of a child born during the mother's marriage to another man. The husband in this case is presumed to be the child's natural father, as the child was born during the marriage (§ 7611, subd. (a)) and he has received the child into his home and openly holds out the child as his natural child (§ 7611, subd. (d)). Because, however, the husband and wife were not cohabiting at the time of conception, the presumption is not conclusive. (See, e.g., *Steven W.* v. *Matthew S.* (1995) 33 Cal.App.4th 1108, 1114; *City and*

(...continued)
existence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611. [¶] (2) For the purpose of declaring the nonexistence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party."

County of San Francisco v. *Strahlendorf* (1992) 7 Cal.App.4th 1911, 1915; § 7540.)[1] The alleged biological father does not meet any of the statutory criteria for presumed fatherhood. He relies, instead, on an asserted constitutional liberty interest, protected as a matter of substantive due process, not to be denied the opportunity to establish a parental relationship with the child.

We conclude the alleged biological father in this case has no constitutionally protected liberty interest defeating California's statutory presumption favoring the husband.

FACTS AND PROCEDURAL POSTURE

Our recitation of facts is drawn from the trial

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[1] Section 7540 provides: "Except as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

court's findings and the parties' pleadings.

Dawn D. and her husband, Frank F., were married in June 1989. In early January 1995 Dawn separated from her husband and began living with Jerry K. Dawn became pregnant the following month. In April 1995 she moved out of Jerry's household and returned to her husband. In August 1995 Jerry filed the complaint in the present action to establish a parental relationship and seeking eventual visitation with the as-yet unborn child. In anticipation of his assuming fatherly responsibilities, Jerry completed a parenting course. On November 9, 1995, Dawn gave birth to a son, who has resided with Dawn and Frank ever since that time. Jerry attempted to negotiate with Dawn and Frank an agreement for child support and visitation, but the parties have not effectuated such an agreement.

Dawn moved for judgment on the pleadings. She argued Jerry could not assert a valid claim to be the father

of her son, inasmuch as her husband is presumptively the child's natural father and California law recognizes only one natural father for any child. She further contended Jerry was not within the class of persons granted standing to seek blood testing under the Family Code. Finally, she contended the state's interest in the integrity and preservation of the family unit outweighed Jerry's interest in establishing his paternity of her son.

The trial court denied Dawn's motion. Relying on *Michael M.* v. *Giovanna F.* (1992) 5 Cal.App.4th 1272 (*Michael M.*) and *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*), the court found that because Jerry had done all he could to demonstrate a commitment to his parental responsibilities, he had established "due process rights" that must be balanced against the state's interest in enforcing the statutory presumption in favor of Frank. The trial court noted the state's continuing interest in the welfare of the child and in family stability, an interest best

exemplified in the conclusive presumption contained in section 7540, which allows parentage to be challenged by someone other than the husband or wife only in exceptional circumstances. The trial court reasoned, however, that the inapplicability of section 7540 in this case supports an inference "the [L]egislature perceived a decreased threat to the family stability if a wife is not cohabiting with her husband at the time of the conception." The court therefore concluded Jerry should be permitted to try to establish he is the child's biological father and, to that end, granted Jerry's motion for blood testing.

Dawn petitioned the Court of Appeal, seeking a stay of further proceedings and a writ of mandate to compel the trial court to vacate its order denying her motion for judgment on the pleadings and enter a new order granting the motion. The Court of Appeal invited Jerry to file a response and notified the parties that unless good cause were shown it might issue a peremptory writ in

the first instance. (See *Palma* v. *U. S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.) After consideration of the parties' responsive papers, the Court of Appeal summarily denied the petition.

We granted Dawn's petition for review, directed respondent court to show cause before this court why the relief sought in the petition for writ of mandate should not be granted, and stayed all proceedings in the superior court pending final determination of this cause.

DISCUSSION

The Uniform Parentage Act, section 7600 et seq. (the Act), provides the framework by which California courts make paternity determinations. (§ 7610, subd. (b).) Under section 7611 of the Act, a man is presumed the natural father of a child born during, or within 300 days after the termination of, his marriage to the child's mother. (§ 7611, subd. (a).) He also attains the status of presumed

father if he receives the child into his home and openly holds out the child as his natural child. (§ 7611, subd. (d).) By either of these provisions, Dawn's husband, Frank, is presumed the father of the child involved in this litigation.[1] Jerry, by contrast, meets none of the statutory conditions for presumed fatherhood: He has neither married nor attempted to marry Dawn, nor, despite his considerable efforts to assert parental rights, has he actually received the child into his home. (§ 7611; see *Kelsey S., supra,* 1 Cal.4th 816, 826-830 [declining to

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Had Frank and Dawn been cohabiting at the time of the child's conception (see, e.g., *Steven W.* v. *Matthew S., supra,* 33 Cal.App.4th 1108; *City and County of San Francisco* v. *Strahlendorf, supra,* 7 Cal.App.4th 1911), Frank's paternity would be "conclusively" presumed (§ 7540). Although the presumption arising from the birth of a child to a wife cohabiting with her husband is denominated "conclusive," in fact the presumption is subject to challenge under certain circumstances not relevant here. (See §§ 7540, 7541, subds. (b), (c).)

recognize doctrine of constructive receipt of child into man's home].)

The presumptions arising under section 7611 are rebuttable presumptions affecting the burden of proof and may be rebutted in an appropriate action by clear and convincing evidence. (§ 7612, subd. (a).) The Act, however, restricts standing to challenge the presumption of a *husband's* paternity to the child, the child's natural mother, or a presumed father. (§ 7630, subd. (a); cf. § 7631.)[1] The Act thus precludes Jerry from bringing

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As noted (see fn. 2, *ante*), section 7630, subdivision (a), grants standing only to the child, the child's mother, or a man presumed to be the child's father as a result of his marriage to the child's mother to bring an action to declare the existence or nonexistence of the father and child relationship presumed as a result of the mother's marriage to the presumed father. Thus, even if Jerry had himself become a presumed father under subdivision (d) of section 7611 by receiving and acknowledging the child, subdivision (a) of section 7630 would not

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confer on him standing to challenge the paternity of another whose presumed fatherhood was based on marriage to the child's mother at the time the child was born.

Section 7630, subdivision (b), by contrast, allows "[a]ny interested party" to bring an action to determine the existence or nonexistence of the father and child relationship presumed under subdivision (d) of section 7611. No reported cases have interpreted this provision in light of facts similar to those present here. Arguably Jerry would qualify as an "interested party" for purposes of bringing an action to establish Frank's nonpaternity under subdivision (d) of section 7611. Such an action, however, whatever its outcome, would appear neither to affect Frank's status as a presumed father under subdivision (a) of section 7611 nor to confer on Jerry presumed father status. (See also § 7635, subd. (b) [in an action to determine the paternity of a presumed father, the mother, each presumed father, and any alleged natural father must receive notice and an opportunity to be heard, and may be made parties].)

Section 7631 provides in pertinent part: "Except as to cases coming within [the conclusive presumption of section 7540], a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child

(continued...)

this paternity action and, therefore, from compelling Dawn and the child to submit to blood tests to resolve the question of biological parenthood. (See §§ 7551 [court may order blood tests in a civil action or proceeding in which paternity is a relevant fact], 7554 [governing determinations of paternity based on blood tests].)

Jerry does not argue he has statutory standing to bring this action; his argument is directed to the proposition that a biological father has a liberty interest, protected as a matter of substantive due process, in being permitted to develop a parental relationship with his offspring. The Act, he contends, is therefore

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(...continued)
having a presumed father under Section 7611, if the mother relinquishes for, consents to, or proposes to relinquish for or consent to, the adoption of the child." Because Dawn is not relinquishing for or consenting to her child's adoption, section 7631 has no relevance to this case.

unconstitutional to the extent it deprives him of the opportunity to establish his parenthood.

A preliminary question is the nature of our inquiry in the case of a substantive due process challenge to the Act. California courts have examined substantive due process claims to a right to establish parenthood on a case-by-case basis. "As our discussions have indicated, the reasonableness of a statutory limitation on the right to offer proof of parentage depends on circumstances prevailing in each particular case. Accordingly, a court, before receiving evidence thereof, must in each instance make a preliminary determination, as by offer of proof, that due process concepts would be offended if the particular claimant to parentage were denied an opportunity to prove his claim." (*In re Lisa R.* (1975) 13 Cal.3d 636, 651, fn. 17; see also *Michelle W.* v. *Ronald W.* (1985) 39 Cal.3d 354, 360.)

Dawn forcefully argues that such a method of

analysis runs the risk of merely substituting this court's policy choices for those of the Legislature. As the United States Supreme Court recently noted in a different context, "[W]e 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' [Citation.] By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' [citation], lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, [citation]." (*Washington* v. *Glucksberg* (1997) ___ U.S. ___ [138 L.Ed.2d 772, 787] [upholding, against Fourteenth Amendment challenge, Washington statute criminalizing the act of causing or assisting a suicide].)

We are sympathetic to the democratic motivation underlying the cautious attitude of the authority just quoted. Nevertheless, if the judiciary is to fulfill its role in our tripartite system of government as the final arbiter of constitutional issues, it cannot hope to escape the tension between legislative policy determinations and the challenges raised by those who would seek exceptions thereto. We can, however, while entertaining such challenges, seek to hold the tension in check by always presuming the constitutional validity of legislative acts and resolving doubts in favor of the statute. (*Amwest Surety Ins. Co.* v. *Wilson* (1995) 11 Cal.4th 1243, 1252.)

The due process clause of the Fourteenth Amendment to the federal Constitution provides that "[n]o state shall deprive any person of life, liberty, or property, without due process of law. . . ." (U.S. Const., 14th Amend., § 1.) The United States Supreme Court has long recognized that this provision is not only a guarantee of

procedural due process, but also *substantively* protects certain liberties from state infringement except when justified by the most compelling reasons: "[A] 'substantive due process' claim relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Reno* v. *Flores* (1993) 507 U.S. 292, 301-302.) The high court has recognized that the liberty interests protected by the due process clause are broader than just the freedom from physical restraint: "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry . . .; to have children . . .; to direct the education and upbringing

of one's children . . .; to marital privacy . . .; to use contraception . . .; to bodily integrity . . .; and to abortion." (*Washington* v. *Glucksberg*, *supra*, ___U.S.___, 138 L.Ed.2d at p. 787, citations omitted.)

The United States Supreme Court has developed the following methodology for deciding whether an asserted interest is a fundamental liberty interest protected by due process: First, the court must make a "'careful description' of the asserted fundamental liberty interest." (*Washington* v. *Glucksberg*, *supra*, 138 L.Ed.2d at p. 788.) This "careful description" is concrete and particularized, rather than abstract and general; thus, in *Washington* v. *Glucksberg*, a case addressing a state statute forbidding assisted suicide, the high court rejected the view the interest in question was "'whether there is a liberty interest in determining the time and manner of one's death'" or a "'liberty to choose how to die.'" (*Id.* at p. 789.) Instead, the high court formulated the interest more

specifically as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." (*Ibid.*) Likewise, in a case challenging the policy of the Immigration and Naturalization Service to place deportable alien juveniles in custodial child care rather than to release them to unrelated adults, the Supreme Court rejected the contention the right at issue was the "'freedom from physical restraint,'" instead characterizing it as "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." (*Reno* v. *Flores*, *supra*, 507 U.S. 292, 302.)

Second, the court must determine whether the asserted interest, as carefully described, is one of our fundamental rights and liberties; central to this

determination is whether the asserted interest finds support in our history, our traditions, and the conscience of our people. (*Washington* v. *Glucksberg*, *supra*, 138 L.Ed.2d at p. 788; *Reno* v. *Flores*, *supra*, 507 U.S. 292, 303.)

Only if a court decides the asserted liberty interest is a fundamental interest protected by the due process clause does it weigh the state's countervailing interest, to determine whether the latter is sufficiently compelling to justify the state's infringement of the liberty interest. "[B]y establishing a threshold requirement--that a challenged state action implicate a fundamental right--before requiring more than a reasonable relation to a legitimate state interest to justify the action, [this approach] avoids the need for complex balancing of competing interests in every case." (*Washington* v. *Glucksberg*, *supra*, 138 L.Ed.2d at pp. 788-789.)

Adhering to the United States Supreme Court's methodology for analyzing substantive due process claims,

our first step, therefore, is to make a "careful description" of the asserted liberty interest. (*Washington* v. *Glucksberg*, *supra*, 138 L.Ed.2d at p. 788.) Carefully described, the interest for which the alleged biological father, Jerry, seeks constitutional protection is his interest in establishing a relationship with his child born to a woman married to another man at the time of the child's conception and birth.

The next step is to decide whether this interest is constitutionally protected. This question has a ready answer, for the United States Supreme Court has considered and rejected due process protection for this interest. In *Michael H.* v. *Gerald D.* (1989) 491 U.S. 110, 124-127, four justices, in a plurality opinion by Justice Scalia, concluded the biological father of a child born to a woman married to another man had no liberty interest in continuing his relationship with the child, notwithstanding that he had lived with the mother and

child for almost a year and visited her for an additional eight months, and the child called him "Daddy." In rejecting the liberty interest claim of a man who was not only the biological father, but also had an actual personal relationship with the child, the plurality necessarily rejected as well the position that a biological connection without any actual personal relationship gives rise to a protected liberty interest.

Three dissenting justices in *Michael H.* v. *Gerald D.*, supra, 491 U.S. 110, concluded the actual personal relationship between the biological father and his child was a protected liberty interest. They rejected, however, the possibility that a biological father having no *existing* personal relationship with his child born to a woman married to another man could have any liberty interest in establishing a relationship with the child: "[A]lthough an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his

relationship with that child, such a link combined with a substantial parent-child relationship will do so." (*Id.* at pp. 142-143 (dis. opn. of Brennan, J., joined by Marshall, J., and Blackmun, J.).) The dissenting opinion concluded, "a mere biological connection is insufficient to establish a liberty interest on the part of an unwed father. . . ." (*Id.* at p. 143, fn. 2.) Thus, at least seven of the nine high court justices in *Michael H.* expressly rejected the view that an unwed father's biological link to a child alone gives rise to a protected liberty interest. (See also *Lehr* v. *Robertson* (1983) 463 U.S. 248, 259-260 [drawing a "clear distinction between a mere biological relationship and an *actual* relationship of parental responsibility." (Italics added]).)

Here, Jerry has never had any personal relationship with Dawn's child, only an alleged biological link with an attempt to negotiate an agreement for child support and visitation. As explained above, in *Michael H.*

v. *Gerald D.*, *supra*, 491 U.S. 110, the United States Supreme Court decided that a biological father's mere desire to establish a personal relationship with the child is not a fundamental liberty interest protected by the Due Process Clause. Accordingly, in this case Jerry's claim must fail.

Contrary to our conclusion, the dissent maintains Jerry does have a protected liberty interest in establishing a relationship with Dawn's child. It relies on two United States Supreme Court decisions, *Michael H.* v. *Gerald D.*, *supra*, 491 U.S. 110 and *Lehr* v. *Robertson*, *supra*, 463 U.S. 248, and one of this court's adoption cases, *Adoption of Kelsey S.*, *supra*, 1 Cal.4th 816. The dissent, however, fails to acknowledge the distinction the high court in *Michael H.* v. *Gerald D.*, *supra*, 491 U.S. 110, drew between an unwed father's interest in maintaining and preserving an *existing* parent-child relationship and the claim, rejected by at least seven justices, that an unwed

father's biological connection alone to a child born to a married woman gives rise to a protected liberty interest in establishing a relationship with the child.[1]

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[1] Contrary to the dissent in the present case, that dissenting Justice Brennan in *Michael H.* v. *Gerald D.*, *supra*, 491 U.S. 110, 136, would find the mother's marital status "not decisive" (*id.* at p. 144) on the question whether the Constitution protects a biological father's interest in establishing a relationship with the child does not mean her marital status is *irrelevant*, especially where, as here, the child was born into the marital family and the alleged biological father has no actual relationship with the child. Nor, contrary to the dissent, is Justice Brennan's apparent conclusion that the *duration* of the biological parent-child relationship is irrelevant to its constitutional status (*id.* at p. 144, fn. 3) the equivalent of a conclusion that its very *existence* is likewise irrelevant. Indeed, as we have seen, in a passage ignored by the dissent in this case, Justice Brennan found a mere biological connection insufficient to create a constitutionally protected liberty interest on the part of the biological father. (*Id.* at pp. 142-143, fn. 2 [dis. opn. of Brennan, J.].) We do not find Justice Brennan's conclusion in this regard necessarily inconsistent with the dissent of Justice White, which Justice Brennan joined; even if

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As for *Lehr* v. *Robertson*, in that case an unwed mother, after her child's birth, married another man who then adopted the child; the unwed father claimed due process entitled him to notice and a hearing before the adoption could occur. (*Lehr* v. *Robertson*, *supra*, 463 U.S. 248, 250.) Like *Adoption of Kelsey S.*, *supra*, 1 Cal.4th 816, *Lehr* v. *Robertson* concerned a child born to two unwed parents, not, as here, a child born into a marriage. Thus, the adoption cases do not support protecting as a liberty interest Jerry's desire to establish a relationship with Dawn's child born into a marriage. Moreover, the high court in *Lehr* v. *Robertson* never clearly decided to what extent the unwed father in that case had a protected liberty interest in the opportunity to develop a relationship with his child, nor was it necessary

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it were, however, we believe Justice Brennan's opinion best reflects his own views.

for the court do so. Rather, after deciding that an unwed father's desire to establish a relationship with his child born to an unwed mother was not entitled to the constitutional protection accorded to existing parent-child relationships, the court concluded the state had adequately protected any constitutional interest the father may have possessed by providing a means for unwed biological fathers to register with the state and receive notification of any adoption proceedings involving their children. (*Lehr* v. *Robertson*, *supra*, 463 U.S. 248, 261-265.) The high court's subsequent decision in *Michael H.* v. *Gerald D.*, *supra*, 491 U.S. 110 made clear that the biological father of a child born to a woman married to another man has no liberty interest in establishing a relationship with the child.

The dissent further suggests Jerry is potentially liable for financial support of Dawn's child, but the cases it cites in support of this startling assertion do not so hold. In *Alicia R.* v. *Timothy M.* (1994) 29 Cal.App.4th 1232,

1235-1238, a biological father was ordered to pay support only after a judgment of nullity of the mother's marriage with a finding there were no children of the marriage, and after blood tests had established his paternity. In *County of Orange* v. *Leslie B.* (1993) 14 Cal.App.4th 976, 980-983, the Court of Appeal declined to apply the conclusive presumption of a husband's paternity (former Evid. Code, § 621), noting: "Here there is no marital union to disrupt [by holding the biological father liable for child support]. [Wife] and [Husband's] brief marriage ended well before [the child] was born. The three never lived together as a family unit. [The child] knows [Husband] is not her father and [Husband] did not know about [the child] until he was brought into this action, 13 years later." (*Id.* at p. 982.) The dissent cites no

authority remotely similar to this case, in which the child was born into a validly existing marital family unit.[1]

CONCLUSION

Because Jerry cannot establish a constitutionally protected liberty interest in being allowed to form a parental relationship with Dawn's child, application to this case of sections 7611 and 7630 does not deprive him of

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[1] Citing *Salas* v. *Cortez* (1979) 24 Cal.3d 22, 34 (*Salas*), Jerry argues the state has an interest in an *accurate* determination of biological paternity. He takes that decision out of context. In *Salas* we concluded procedural due process requires the appointment of counsel for indigent defendants in paternity actions prosecuted by the state, balancing the state's largely financial interest in denying counsel against the profound emotional, financial and legal implications of an erroneous paternity judgment. (*Id.* at pp. 29-34.) *Salas* did not address the situation in the present case, where a man is actively seeking to establish his paternity of a child born to a married woman whose husband is statutorily presumed to be the child's father and is fulfilling that role. (See § 7611, subds. (a), (d).)

due process. The judgment of the Court of Appeal therefore is reversed, and the cause is remanded to that court with directions to issue a writ of mandate directing respondent Superior Court of Riverside County to vacate its order denying Dawn's motion for judgment on the pleadings and to enter a new order granting the motion.

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

BAXTER, J.

BROWN, J.

CONCURRING OPINION BY KENNARD, J.

The due process clause of the Fourteenth Amendment to the federal Constitution, in its "substantive" aspect, protects fundamental liberties from state interference absent a compelling reason for the state's action. At issue in this case is whether a biological father's desire to establish a relationship with his child born to a woman married to another man is a constitutionally protected fundamental liberty interest. I concur fully in the majority's conclusion that, in the absence of any existing personal relationship with the child, a biological father lacks any constitutionally protected liberty interest. I write separately to note that there are additional grounds also supporting that conclusion.

I

This case involves Dawn, Dawn's child conceived and born during her marriage to her husband Frank, and Jerry, who alleges he is the biological father of Dawn's child. Dawn and Frank have had exclusive custody of the child since birth, and Jerry has established no personal relationship with the child. Before birth, Jerry brought suit alleging that he is the biological father of Dawn's child and seeking custody and visitation. As the majority explains, California law presumes that, because the child was born during Dawn's marriage to Frank, Frank is the father of Dawn's child, and it precludes Jerry from bringing any legal action to challenge that presumption. (Fam. Code, §§ 7611, subd. (a), 7630, subd. (a).) Jerry contends nonetheless that he has a liberty interest protected by the due process clause of the United States Constitution in establishing a parental relationship with Dawn's child. The trial court held that if Jerry was the biological father of Dawn's child he had a substantive due process right to establish a relationship with the child, and on that basis ordered blood testing to determine whether Jerry was the

biological father of Dawn's child. The Court of Appeal denied without comment Dawn's petition for a writ of mandate seeking to overturn the trial court's ruling.

II

As the majority opinion explains, in *Michael H.* v. *Gerald D.* (1989) 491 U.S. 110, 124-127, seven justices of the United States Supreme Court concluded that, in the absence of any existing personal relationship with the child, a biological father's desire to establish a relationship with his child born to a woman married to another man is not a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment to the federal Constitution. But, even if the high court had not decided the question in *Michael H.* v. *Gerald D.* and we were free to consider the matter independently, I would still reach this same conclusion.

As the majority notes, in deciding whether an asserted interest is one of our fundamental rights and liberties substantively protected by the due process clause, a court must examine whether the interest, " 'carefully described,' " finds support in our history, our traditions, and the conscience of our people. (*Washington* v. *Glucksberg* (1997) ___ U.S. ___, 117 S.Ct. 2258, 2268-2269; accord, *Reno* v. *Flores* (1993) 507 U.S. 292, 303.) Here, there is no support in history or our legal tradition for Jerry's claim that a biological father without any actual personal relationship with his child born to a woman married to another man has a fundamental right to establish a relationship with the child. Indeed, history and tradition are directly to the contrary, for society has consistently *denied* to the biological father in these circumstances any opportunity to establish paternal rights over the child of another man's wife. For centuries, there has existed the presumption of legitimacy: the legal presumption that a child born during wedlock is the husband's issue (absent proof of the husband's impotence). (10 Am.Jur.2d (1963) Bastards, § 11, p. 851

["The principle that children born into wedlock are presumed to be legitimate is universally recognized."].) Lord Coke stated the common law rule: "By the common law if the husband be within the foure seas, that is within the jurisdiction of the king of England, if the wife hath issue, no proofe is to be admitted to prove the child a bastard, . . . unlesse the husband hath an apparent impossibilitie of procreation."[1] (Coke on Littleton, Institutes of the Laws of England (1628) 244a [bk. 3, ch. 6, § 399].)

Like other jurisdictions, California has long recognized the presumption of legitimacy. In 1872, our Legislature codified the presumption as follows: If the husband and wife were cohabiting at the time of conception and the husband was not impotent, the presumption that the husband was the father was indisputable. (Code Civ. Proc., former § 1962, subd. 5, enacted 1872, amended by Stats. 1955, ch. 948, § 3, p. 1835, repealed by Stats. 1965, ch. 299, § 110, p. 1363, eff. Jan. 1, 1967 ["the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate"]; *Estate of Mills*, *supra*, 137 Cal. 298, 301-304.) A similar provision continues in our current Family Code. (Fam. Code, § 7540.) If the parents were married but not cohabiting at the time of conception, the presumption could be disproven, but only by a member of

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[1] As this court noted long ago, Shakespeare also restated this presumption: "King John: Sirrah, your brother is legitimate; Your father's wife did after wedlock bear him; And, if she did play false, the fault was hers; Which fault lies on the hazards of all husbands That marry wives." (Shakespeare, King John, act I, scene 1, quoted in *Estate of Mills* (1902) 137 Cal. 298, 301.)

a narrow class of persons. (Civ. Code, former §§ 193, 195, superseded by Evid. Code, former § 661, enacted by Stats. 1965, ch. 299, § 2, p. 1310, repealed by Stats. 1975, ch. 1244, § 14, p. 3202; accord, Fam. Code, §§ 7611, subd. (a), 7630, subd. (a).) Most important, the group of persons with standing to disprove the presumption has always been limited to designated members of the marital family and their descendants, and an alleged biological father has never been permitted to challenge the paternity of a child born into the marriage of a woman and another man. (Civ. Code, former §§ 193, 195 [permitting challenges only by the husband, wife, or their descendants]; Fam. Code, §§ 7611, subd. (a), 7630, subd. (a) [permitting challenges only by the husband, wife, or child]; see also *In re Madalina* (1917) 174 Cal. 693, 696 [describing this refusal to permit outsiders to challenge the presumption of legitimacy as the "rule prevailing generally in all civilized communities"]; *Michael H.* v. *Gerald D.*, *supra*, 491 U.S. 110, 124-126 (plurality opn. of Scalia, J. [discussing history of the presumption of legitimacy]).)

Nor is there an inconsistency between *Michael H.* v. *Gerald D.*, *supra*, 491 U.S. 110 and our court's decisions prohibiting an unwed mother from unilaterally consenting to an adoption over the objections of an unwed father who has come forward to assume parental responsibility. (*Adoption of Michael H.* (1995) 10 Cal.4th 1043; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816.) When carefully described, the interest for which Jerry seeks constitutional protection differs from the interest at issue in our adoption cases. In those cases, the child was not born to a mother who was the wife in an intact marital family, but to two unwed parents, one of whom (the mother) wished to terminate her parent-child relationship. The interest at issue thus was the interest of an unwed father in establishing a relationship with his child born to an unwed mother who was terminating her

parent-child relationship. Due process protection for this interest does not dictate that Jerry's different interest is likewise protected by due process.

The common law likewise differentiated between fathers of children born to unwed mothers and fathers of children born into the marriage of a woman and another man. At common law, the unwed mother of a child had the right to custody of the child to the exclusion of the biological father. (*Ex Parte Knee* (1804) 127 Eng.Rep. 416; *Rex* v. *Soper* (1793) 101 Eng.Rep. 156; 10 Am.Jur.2d, *supra*, Bastards, §§ 60-61, pp. 889-890; Annot., Right of mother to custody of illegitimate child (1927) 51 A.L.R. 1507, 1512; accord, Civ. Code, former § 200, repealed by Stats. 1975, ch. 1244, § 4, p. 3195; *Guardianship of Smith* (1954) 42 Cal.2d 91, 93.) If, however, the unwed mother died, abandoned or neglected the child, or gave the child up for adoption, the biological father had a right to custody of the child. (10 Am.Jur.2d, *supra*, Bastards, §§ 61-62, pp. 890-891; accord, *Guardianship of Smith*, *supra*, at p. 93.) Our adoption cases, in permitting a biological father an opportunity to establish a relationship with his child by an unwed mother who was giving the child up for adoption, have not ventured beyond the common law rule; if that same rule were applied to decide in this case whether Jerry's interest was a protected liberty interest, it would not assist him because Dawn, the child's mother, has not given the child up for adoption or otherwise declined her parental responsibilities.

CONCLUSION

A man who wishes to father a child and ensure his relationship with that child can do so by finding a partner, entering into a marriage, and undertaking the responsibilities marriage imposes. One who instead fathers a child with a woman married to another man takes the risk that the child will be raised within that marriage and that he will be excluded from participation in the child's life. The due process clause of the United States Constitution provides no insurance against that risk and is not an instrument for disrupting the marital family in order to satisfy the biological father's unilateral desire, however strong, to turn his genetic connection into a personal relationship.

KENNARD, J.

WE CONCUR:

BAXTER, J.
BROWN, J.

DISSENTING OPINION BY CHIN, J.

I dissent.

The governing decisions of both the United States Supreme Court and this court establish that a biological father who promptly comes forward to assume his paternal responsibilities has a constitutional liberty interest in the *opportunity* to develop a relationship with his child, which the state may not extinguish without due process of law. The *existence* of this interest does not depend on the marital status of the child's mother. The trial court in this case found that Jerry K., who alleges that he is the biological father of Dawn D.'s son, had done all he could under the circumstances to demonstrate a full commitment to his parental responsibilities, and the majority does not contest this finding. Thus, assuming he is the child's biological father, Jerry has a protected constitutional liberty interest in the opportunity to develop a relationship with his son, which the state may not extinguish without due process of law.

In order to determine what process is due, we must balance Jerry's interest against the state's interests. Dawn cites state interests in protecting the child's welfare and in preserving the stability of the marital family. These interests are, of course, both legitimate and substantial. However, on the facts of this case, they do not justify the state's categorical presumption that Jerry's exclusion from the child's life is warranted and its refusal to afford Jerry a hearing on the matter.

In reaching this conclusion, I do not suggest what the outcome of a hearing should be. A court might very well find that, under the circumstances, Jerry should have no contact with the child, even if he is the biological father. Moreover, the state may constitutionally enact a rebuttable presumption that this outcome serves the child's best interests and may establish hearing procedures to

protect the stability of the marital family. However, as a matter of due process, the state may *not* constitutionally deprive Jerry of *all* opportunity to be heard. Therefore, I cannot join the majority.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the trial court findings, Dawn and Frank married in June 1989. In early January 1995, Dawn left Frank and began living with Jerry. In February 1995, Dawn became pregnant. Two months later, in April, she moved out of Jerry's home and moved back in with Frank. In November 1995, Dawn gave birth to a son.

In August 1995, before the child's birth, Jerry filed a complaint to establish a parental relationship. The complaint requested joint legal custody, with physical custody awarded to Dawn subject to Jerry's right of reasonable visitation.

Dawn answered the complaint in September 1995, asking the court to deny relief. She subsequently moved for judgment on the pleadings, arguing that Jerry could not maintain a paternity action because Frank was the child's presumed father under Family Code section 7611.[1] Dawn asserted that Frank was a presumed father under this statute because the child was born during their marriage and Frank received the child into his home and openly held the child out as his own. She also asserted that Jerry lacked standing to request a blood test to establish biological paternity.

Jerry opposed the motion and submitted supporting evidence. According to his declaration, he began a sexual relationship with Dawn in December 1994, and she moved in with him in January 1995. She amended her voter registration to reflect Jerry's address and had the Post Office change her mailing address to Jerry's. Dawn told

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[1] All further statutory references are to the Family Code.

Jerry that she would marry him as soon as she legally could and that she wanted to start a family. At Dawn's request, Jerry submitted to fertility testing. Jerry also began building an addition to his home in anticipation of having a child with Dawn. After Dawn became pregnant, she told people that the baby was Jerry's, and that she and Jerry intended to marry. Jerry also submitted declarations from friends corroborating some of the statements in his declaration, including his assertion that Dawn said she wanted to marry Jerry and have children with him.

Dawn submitted reply declarations contesting some of Jerry's assertions. For example, she denied telling Jerry that she would marry him as soon as she could. She also denied ever having an intent to change her domicile to Jerry's residence. According to Dawn and Frank, they continued to have contact with each other while she lived with Jerry.

After argument, the trial court denied Dawn's motion. Applying the relevant authorities, it first found that, if Jerry was the biological father, then he had a constitutionally protected interest in having an opportunity to develop a relationship with the child. In reaching this conclusion, the court stated: "It is hard to imagine what else [Jerry] could have done under these circumstances to 'preserve his interest' . . . and to prove that he has 'promptly come forward and demonstrated a full commitment to his parental responsibilities.' [Jerry] filed the within action to determine parentage prior to the birth of the child. Once he learned that the child was born, he began negotiations with [Dawn] for blood testing, payment of child support and visitation. It would appear from correspondence between counsel that an agreement had been reached for visitation and payment of child support. It also appears that [Jerry] took a parenting class . . . in preparation for the birth of the child and his anticipated parental duties." The court then balanced Jerry's interest against the state's interest in the child's welfare and family

stability. It concluded that, under the circumstances, Jerry should have an opportunity to establish he is the child's biological father.

The Court of Appeal summarily denied Dawn's petition for writ of mandate. We then granted Dawn's petition for review.

II. DISCUSSION

A. *Jerry Has a Constitutionally Protected Interest*

Constitutional due process protections "apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." (*Board of Regents* v. *Roth* (1972) 408 U.S. 564, 569 (*Roth*).) Accordingly, the first step in analyzing a due process claim is to determine whether "the interest is within the Fourteenth Amendment's protection of liberty and property." (*Id.* at p. 571.) We must "begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. [Citation.] Only after that interest has been identified, can we properly evaluate the adequacy of the State's process. [Citation.]" (*Lehr* v. *Robertson* (1983) 463 U.S. 248, 256 (*Lehr*).) Thus, "we are faced with . . . a familiar two-part inquiry: we must determine whether [Jerry] was deprived of a protected interest, and, if so, what process was his due." (*Logan* v. *Zimmerman Brush Co.* (1982) 455 U.S. 422, 428.)

Regarding the first issue, applying the decisions of the United States Supreme Court and this court, I conclude Jerry has a constitutional liberty interest in the opportunity to develop a relationship with Dawn's child, assuming he is the child's biological father. The high court has addressed the constitutional rights of unwed fathers several times. In *Michael H.* v. *Gerald D.* (1989) 491 U.S. 110 (*Michael H.*), the high court considered the constitutionality of a California statute providing that " 'the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a

child of the marriage.' " (*Id.* at p. 117 (plur. opn. of Scalia, J.).) In *Michael H.*, during the first year of the child's life, she and her mother lived with the alleged natural father for two to three months, and he held her out as his child. The mother, with the child, then left the alleged natural father and rebuffed his further visitation attempts. He then filed a filiation action to establish paternity and visitation rights. Nine months later, the mother again became involved with the alleged natural father. For the next eight months, when he was in town, he lived with the mother and her child and held the child out as his daughter. The mother then left the alleged natural father and reconciled with her husband. The alleged natural father and the child then sought visitation rights. (*Michael H., supra,* 491 U.S. at pp. 113-115 (plur. opn. of Scalia, J.).)

There was no majority opinion in *Michael H.* Justice Scalia, writing for the plurality, found that the alleged natural father had no "constitutionally protected right" under the circumstances. (*Michael H., supra,* 491 U.S. at p. 129, fn. 7 (plur. opn. of Scalia, J.).) However, Justice Stevens, who provided the fifth vote to uphold the statutory scheme, expressly refused to endorse this conclusion. Although concurring in the judgment, he disagreed with the plurality's rejection of "the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth." (*Id.* at p. 133 (conc. opn. of Stevens, J.).) Indeed, he was "willing to assume for the purpose of deciding [the] case that [the alleged natural father's] relationship with [the child] [was] strong enough to give him a constitutional right to try to convince a trial judge that [the child's] best interest would be served by granting him visitation rights." (*Ibid.*) However, Justice Stevens found the statutory scheme "consistent with the Due Process Clause" because he was

"convinced that the trial judge had the authority under state law both to hear [the alleged natural father's] plea for visitation rights and to grant him such rights if [the child's] best interests so warranted . . . ." (*Id.* at p. 136 (conc. opn. of Stevens, J.).)

Justices White and Brennan filed separate dissents. In his dissent, Justice White, joined by Justice Brennan, found that the alleged natural father had "a liberty interest that cannot be denied without due process of the law . . . ." (*Michael H.*, *supra*, 491 U.S. at p. 157 (dis. opn. of White, J.).) Justice White cited the court's prior cases recognizing the liberty interest of a natural father in his relationship with his child, noting that none of those cases indicated "that the father's rights were dependent on the marital status of the mother or biological father." (*Ibid.*) The "basic principle" is that "an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child." (*Id.* at pp. 157-158, fn. omitted (dis. opn. of White, J.).) Justice White stressed that the natural father "ha[d] asserted his interests in raising and providing for his child since the very time of the child's birth." (*Id.* at p. 159 (dis. opn. of White, J.).) He also noted a previous high court decision suggesting that states "must provide a biological father of an illegitimate child the means by which he may establish his paternity so that he may have the opportunity to develop a relationship with his child." (*Ibid.*) Quoting *Lehr*, *supra*, 463 U.S. at page 261, Justice White explained: " 'When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child" [citation], his interest in personal contact with his child acquires substantial protection under the Due Process Clause.' [Citation.]" (*Michael H.*, *supra*, 491 U.S. at p. 160 (dis. opn. of White, J.).)

Justice Brennan, in a dissent joined by Justices

Marshall and Blackmun, also found that the alleged natural father had a constitutional "liberty interest in his relationship" with the child. (*Michael H.*, *supra*, 491 U.S. at p. 136 (dis. opn. of Brennan, J.).) Like Justice White, Justice Brennan explained that "marriage is not decisive in answering the question whether the Constitution protects the parental relationship under consideration." (*Id.* at p. 144 (dis. opn. of Brennan, J.).) Also like Justice White, Justice Brennan quoted *Lehr, supra*, 463 U.S. at page 261, in declaring that the interest of an unwed father in personal contact with his child acquires substantial protection when he " 'demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child . . . ." ' " (*Michael H., supra*, 491 U.S. at p. 143 (dis. opn. of Brennan, J.).) Summarizing the "common ground shared by a majority of" the high court, Justice Brennan explained: "Five Members of the Court refuse to foreclose 'the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth.' [Citations.] Five Justices agree that the flaw inhering in a conclusive presumption that terminates a constitutionally protected interest without any hearing whatsoever is a *procedural* one. [Citations.] Four Members of the Court agree that [the alleged natural father] has a liberty interest in his relationship with [the child] [citations], and one assumes for purposes of this case that he does [citation]." (*Michael H., supra*, 491 U.S. at p. 136, original italics (dis. opn. of Brennan, J.).)

Lehr, the decision that both Justices Brennan and White quoted in their *Michael H.* dissents, is perhaps even more instructive on the issue before us. There, an alleged natural father sought to overturn an order of a New York state court granting a petition for adoption of a child by the mother's husband. The mother had married her

husband eight months after the child's birth. (*Lehr*, *supra*, 463 U.S. at p. 250.) The adoption petition was filed when the child was two years old. (*Ibid.*) During the child's lifetime, the alleged natural father never lived with the mother and child or provided them with financial support. (*Id.* at p. 252.) The alleged natural father was not sent notice of the adoption proceeding and learned of it only four days before a court granted the adoption petition. (*Id.* at pp. 252-253.) In seeking to overturn the adoption order, he argued that the state had impermissibly extinguished his constitutional liberty interest in the potential relationship with his child without due process of law. (*Id.* at p. 255.)

Although the high court affirmed the adoption order, its reasoning indicates that the alleged natural father had a constitutional liberty interest that entitled him to due process, despite his initial lack of effort to have contact with the child. In the first part of its opinion, the court "consider[ed] the nature of the interest in liberty for which [the alleged natural father] claims constitutional protection . . . ." (*Lehr*, *supra*, 463 U.S. at p. 256.) The court explained: "The intangible fibers that connect parent and child . . . are sufficiently vital to merit constitutional protection in appropriate cases." (*Ibid.*) The court further explained: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." (*Id.* at p. 262, fn. omitted.) The court noted that the alleged natural father had "never had any significant custodial, personal, or financial relationship with [the child], and he did not

seek to establish a legal tie until after she was two years old." (*Ibid.*, fn. omitted.) Despite this lack of effort, the court stated that it had to determine whether New York's statutes "adequately protected [the alleged natural father's] *opportunity* to form such a relationship." (*Id.* at p. 263, italics added.)

The court then considered, and found constitutionally adequate, the procedures New York afforded natural fathers. Under the statutory scheme, any man who filed with the state's "putative father registry" or who fell within certain listed classes of possible unwed fathers was entitled to notice of any adoption proceeding and an opportunity to present evidence regarding the child's best interests. (*Lehr*, *supra*, 463 U.S. at pp. 251-252 & fn. 5.) According to the high court, "[i]f this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate." (*Id.* at pp. 263-264.) However, the statutory scheme "adequately protected" the alleged natural father's "opportunity to establish a relationship with" his child because "the right to receive notice was completely within [his] control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any [adoption] proceedings . . . ." (*Id.* at p. 264.)

As this discussion demonstrates, the high court in *Lehr* concluded that the alleged natural father had a constitutional liberty interest in the *opportunity* to develop a relationship with his child, even though he had made *no effort* to establish or cultivate a relationship with her during the first two years of her life. This conclusion is apparent both from the language of the court's opinion, which I have set forth above, and from the very fact that the court proceeded to the second part of the due process analysis, determining the constitutional adequacy of the state procedures. Had it found that the alleged natural father had no constitutional liberty interest, the court

would not have moved on to this second step.

In *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*), we reached precisely this interpretation of *Lehr*. There, we considered the constitutional rights of Rickie M., a biological father who did not achieve the status of a presumed father under California law in part because the child's mother, a court order, and prospective adoptive parents thwarted his attempts to receive the child into his home. (*Kelsey S., supra,* 1 Cal.4th at p. 825.) More specifically, we had to determine the constitutionality of a statutory scheme that permitted adoption of Rickie's biological child by third parties without Rickie's consent. (*Id.* at pp. 824-825.) Applying the recognized analysis for due process claims, we first addressed the nature of Rickie's asserted interest, "guided" by the high court's decisions "dealing with the rights of unwed fathers." (*Id.* at p. 830.) After observing that the high court in *Lehr* "recognized the uniqueness of the biological connection between parent and child," we concluded: "*Lehr* can fairly be read to mean that a father need only make a reasonable and meaningful attempt to establish a relationship [with his natural child], not that he must be successful against all obstacles."[1] (*Kelsey S.*,

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[1] The majority asserts that the high court in *Lehr, supra,* 463 U.S. 248, "never clearly decided to what extent the unwed father in that case had a protected liberty interest in the opportunity to develop a relationship with his child . . . ." (Maj. opn., *ante*, at p. 13.) As I have demonstrated, and as we explained in *Kelsey S., supra,* 1 Cal.4th 816, the high court in *Lehr* clearly did decide that the natural father had *some* constitutionally protected opportunity interest, even if it did not explain the full

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supra, 1 Cal.4th at p. 837.) Describing *Michael H.*, we stated: "[I]t is clear that even in the extreme circumstances of that case—the mother being married to and living with her husband, who was not the child's biological father—a majority of the justices were solicitous of the rights of unwed biological fathers. For them, the *determinative factor* was whether a biological father has *attempted* to establish a relationship with his child." (*Kelsey S., supra,* 1 Cal.4th at p. 837, italics added.) More generally, we extracted from the high court decisions "one unifying and transcendent theme . . . . The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship." (*Id.* at p. 838.) Ultimately, we concluded that "a biological father has a constitutionally cognizable opportunity interest in developing a relationship with his child." (*Id.* at p. 844.) "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent." (*Id.* at p. 849.)

Under these decisions, if Jerry is the child's biological father, then he has a constitutional liberty interest in the opportunity to develop a relationship with his child. As I have previously noted, the trial court found "[i]t . . . hard to imagine what else [Jerry] could have done under these circumstances to 'preserve his interest' . . . and to prove that he has 'promptly come forward and demonstrated a full commitment to his parental responsibilities.' " The majority does not challenge this

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(...continued)
"extent" of that right.

finding, and independently finds that Jerry went to "considerable efforts to assert parental rights." (Maj. opn., *ante*, at p. 6.) Thus, Jerry has done significantly more to assume his paternal responsibilities than did the alleged natural father in *Lehr*. If the alleged natural father in *Lehr*, who made no effort to establish a relationship with his child during the first two years of her life, had a constitutionally protected liberty interest in the opportunity to develop a relationship with his child—and the United States Supreme Court held that he did—then surely Jerry, who has been trying since before the birth of Dawn's child to assume parental responsibilities, has an interest at least as great, assuming he is the natural father. Therefore, the interest Jerry asserts in this case is part of the liberty that the due process clause protects.

B. *The Majority Ignores Kelsey S. and Misinterprets the Separate Opinions in Michael H.*

In concluding that Jerry has no constitutional liberty interest on the facts of this case, the majority relies exclusively on the high court's decision in *Michael H.*, *supra*, 491 U.S. 110. The majority asserts that at least seven justices there considered and rejected due process protection for the interest that Jerry asserts. (Maj. opn., *ante*, at p. 12.) It maintains that my analysis "fails to acknowledge the distinction the high court in *Michael H.* . . . drew between an unwed father's interest in maintaining and preserving an *existing* parent-child relationship and the [rejected] claim . . . that an unwed father's biological connection alone to a child born to a married woman gives rise to a protected liberty interest in establishing a relationship with the child." (Maj. opn., *ante*, at p. 13, original italics.) For several reasons, the majority errs.

First, the majority has mischaracterized my position. I would not, as the majority suggests, hold that "an unwed

father's biological connection *alone* to a child born to a married woman gives rise to a protected liberty interest in establishing a relationship with the child." (Maj. opn., *ante*, at pp. 12-13, italics added; see also *id.* at fn. 6.) Rather, as *both* Justice Brennan and Justice White wrote in *Michael H.*, I would hold that " '[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause.' " (*Michael H.*, *supra*, 491 U.S. at p. 143 (dis. opn. of Brennan, J.); *id.* at p. 160 (dis. opn. of White, J.).)

Second, the majority is incorrect in asserting that a majority of the high court in *Michael H.* held that a natural father has a liberty interest *only* where he successfully establishes a substantial relationship with his child. In fact, *none* of the justices in *Michael H.* adopted that position. To begin with, Justice Scalia's plurality opinion in *Michael H.* expressly rejected the very distinction the majority now purports to draw, i.e., that creation of a natural father's liberty interest depends on the existence of "an established parental relationship." (*Michael H.*, *supra*, 491 U.S. at p. 123.)

Moreover, the majority errs in reading Justice Brennan's *Michael H.* dissent as concluding that a liberty interest arises *only* if the natural father successfully establishes an "*existing* personal relationship" with his child. (Maj. opn., *ante*, at p. 11, original italics.) In so reading that dissent, the majority ignores the statement from Justice Brennan's opinion that I have quoted above, which focuses on whether the natural father " 'demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child" . . . .' " (*Michael H.*, *supra*, 491 U.S. at p. 143 (dis. opn. of Brennan, J.) Furthermore, in relying exclusively on another statement in Justice

Brennan's dissent, the majority fails to appreciate the factual context of the *Michael H.* case. As the majority notes (maj. opn., *ante*, at p. 11), Justice Brennan observed in *Michael H.* that a liberty interest arises when a biological link is "combined with a substantial parent-child relationship." (*Michael H.*, *supra*, 491 U.S. at p. 142 (dis. opn. of Brennan, J.) However, this statement, unlike the broader statement that I have quoted above, simply reflected the facts of the case, which were that the natural father had established a relationship with his child. Thus, contrary to the majority's assertion, nothing in Justice Brennan's dissent even suggests, let alone "expressly" holds (maj. opn., *ante*, at p. 12), that a natural father's constitutional liberty interest arises *only* where he successfully establishes a relationship with his child.

On the contrary, to the extent Justice Brennan, and those who joined his dissent, expressed an opinion in *Michael H.* regarding the constitutional rights of a natural father in circumstances specifically like Jerry's, their views are consistent with, not contrary to, mine. In finding that the natural father in *Michael H.* had a constitutional liberty interest, Justice Brennan emphasized that the natural father "ha[d] from the beginning sought to strengthen and maintain his relationship with" his child. (*Michael H.*, *supra*, 491 U.S. at p. 143 (dis. opn. of Brennan, J.).) Although he also noted at one point that the natural father had "lived with [the child] as her father" (*ibid.*), later in his opinion, Justice Brennan rejected the plurality's suggestion "that the length of time that [the natural father] and [the child] lived together is relevant to the question whether they have a liberty interest in their relationship with each other." (*Id.* at p. 144, fn. 3 (dis. opn. of Brennan, J.).) Justice Brennan's determination that this factor is irrelevant is inconsistent with the majority's conclusion that Justice Brennan would have recognized a constitutional liberty interest *only* where a substantial parent-child relationship has been established.

On the other hand, it is *consistent* with my conclusion and the conclusion we reached in *Kelsey S.*, *supra*, 1 Cal.4th 816, that, under the high court cases, a constitutional liberty interest exists where the biological father promptly comes forward to participate in child rearing.

The third, and perhaps most compelling, reason that I disagree with the majority is that its conclusion and its interpretation of *Michael H.*, *supra*, 491 U.S. 110, are directly contrary to our decision in *Kelsey S.* As I have explained, in *Kelsey S.*, we held that "a biological father has a constitutionally cognizable *opportunity* interest *in developing* a relationship with his child." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 844, italics added.) Thus, "[i]f an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities . . . his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent." (*Id.* at p. 849.) In reaching this conclusion, we interpreted *Lehr*, *supra*, 463 U.S. 248, as holding "that a father need only make a reasonable and meaningful attempt to establish a relationship, not that he must be successful against all obstacles." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 837.) We also observed that, for a majority of the high court in *Michael H.*, "the determinative factor" was *not* whether a substantial relationship exists, but "whether a biological father has *attempted* to establish a relationship with his child." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 837, italics added.) Thus, in *Kelsey S.*, we expressly rejected both the majority's analysis and its current interpretation of the separate opinions in *Michael H.*

The majority does not acknowledge this obvious inconsistency. Instead, it virtually ignores *Kelsey S.*, summarily noting that it was an "adoption case[]" that "concerned a child born to two unwed parents, not, as here, a child born into a marriage." (Maj. opn., *ante*, at p. 13.) Thus, the majority's refusal to follow *Kelsey S.* in

this case turns *solely* on the marital status of the child's mother, Dawn.

The most obvious flaw in the majority's position is its failure to explain why the fact that *Kelsey S.* involved adoption and this one does not warrants ignoring our reading in *Kelsey S.* of *Michael H.*, *supra*, 491 U.S. 110. As I have just noted, in *Kelsey S.*, we concluded that "the determinative factor" for "a majority of the justices" in *Michael H.* was not whether a substantial relationship exists, but "whether a biological father has *attempted* to establish a relationship with his child." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 837, italics added.) That *Kelsey S.* was an adoption case has no bearing on this conclusion. Thus, even were I to agree with the majority that Dawn's marital status is relevant to the existence of Jerry's constitutional right, unlike the majority, I would not feel free to ignore our pronouncements in *Kelsey S.* regarding the majority view in *Michael H.*, which, of course, was not an adoption case but was a case similar to the one before us.

In any event, I cannot adopt the majority's implicit conclusion that the existence of a natural father's constitutional right turns on the marital status of the mother. Nothing in our analysis in *Kelsey S.* supports drawing a distinction on this basis. On the contrary, in there determining the constitutional rights of a natural father, we relied on *all* of the high court cases addressing this question, whether they involved a single mother (e.g., *Lehr*, *supra*, 463 U.S. 248) or a married one (e.g., *Michael H.*, *supra*, 491 U.S. 110). (*Kelsey S.*, *supra*, 1 Cal.4th at pp. 830-839.) Thus, nothing in *Kelsey S.* supports the majority's attempt to limit the relevance of that decision to the adoption context.

Moreover, the majority's focus on the mother's marital status is inconsistent with the majority view in *Michael H.* There, Justice White flatly declared that, under the high court cases, a natural father's rights are not "dependent on the marital status of the mother or

biological father." (*Michael H.*, *supra*, 491 U.S. at p. 157 (dis. opn. of White, J.).) Similarly, Justice Brennan, also writing for Justices Marshall and Blackmun, explained that "marriage is not decisive in answering the question whether the Constitution protects the parental relationship under consideration." (*Id.* at p. 144 (dis. opn. of Brennan, J.).) Justice Stevens "d[id] not agree" with the plurality's view that a natural father could never "have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth." (*Id.* at p. 133 (conc. opn. of Stevens, J.).) In disagreeing with this position, Justice Stevens implicitly rejected the majority's view that, simply because a mother is married, a natural father does not have a constitutional liberty interest in a relationship with his child. Thus, a majority of the high court in *Michael H.* declined to make the existence of a natural father's constitutional right depend on the very factor the majority now cites in refusing to follow *Kelsey S.*, *supra*, 1 Cal.4th 816.

Furthermore, inherent in the majority's conclusion that the mother's marital status is determinative of the natural father's constitutional rights is a balancing of interests that should be irrelevant to determining the *existence* of a constitutional right. To hold, as does the majority, that the existence of Jerry's constitutional right depends on Dawn's marital status is "to say that whether [Jerry] . . . ha[s] a liberty interest varies with the State's interest in recognizing that interest, for it is the State's interest in protecting the marital family—and not [Jerry] and [the child's] interest in their [potential] relationship with each other—that varies with the status of [Dawn] and [Frank's] relationship." (*Michael H.*, *supra*, 491 U.S. at p. 146 (dis. opn. of Brennan, J.).) However, under the "established framework" for analyzing due process claims, we should not "consider the State's interest in limiting the extent of the procedures that will attend the deprivation of

[a constitutional] interest" until *after* we determine that "the person claiming constitutional protection has an interest that the Constitution recognizes . . . ." (*Michael H.*, *supra*, 491 U.S. at p. 145 (dis. opn. of Brennan, J.); see also *Roth*, *supra*, 408 U.S. at pp. 570-571 ["weighing process" is "part of any determination of the *form* of hearing" required, but "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake"].) Accordingly, in concluding that Jerry has no constitutional right, the majority necessarily, and improperly, has balanced his interests against the state's countervailing interests.

As Justice Brennan explained in *Michael H.*, the majority's emphasis on Dawn's marital status "conflates the question whether a liberty interest exists with the question what procedures may be used to terminate or curtail it." (*Michael H.*, *supra*, 491 U.S. at p. 145 (dis. opn. of Brennan, J.).) We should not "look[] at the relationship that the unwed father seeks to disrupt, rather than the one he seeks to [develop,] in determining whether he has a liberty interest in his [potential] relationship with his child. To do otherwise is to allow the State's interest in [preventing] the relationship to play a role in defining the 'liberty' that is protected by the Constitution." (*Ibid.*) "It is a bad day for due process when the State's interest in [preventing] a parent-child relationship is reason to conclude that [the opportunity to develop] that relationship is not part of the 'liberty' protected by the Fourteenth Amendment." (*Id.* at pp. 146-147 (dis. opn. of Brennan, J.); see also *State* ex rel. *Roy Allen S.* v. *Stone* (W.Va. 1996) 474 S.E.2d 554, 563 (*Stone*) [mother's preexisting marriage to another man "alter[s] the nature and weight of the State's interests," not the existence of the natural father's liberty interest].) In short, the majority identifies no valid basis for refusing to follow *Kelsey S.*, *supra*, 1

Cal.4th 816.[1]

After announcing that its task is to determine whether the interest Jerry asserts "finds support in our history, our traditions, and the conscience of our people" (maj. opn., *ante*, at p. 10), the majority makes no independent determination of this question, instead choosing to rely exclusively on *Michael H.*, *supra*, 491 U.S. 110. As I have demonstrated, and as we held in *Kelsey S.*, *supra*, 1 Cal.4th at page 837, *Michael H.* does *not* support the majority's conclusion. Moreover, had the majority independently considered the question, it would have found that in at least 20 states alleged natural fathers in circumstances similar to Jerry's are entitled to some form of a hearing before they are forever excluded from the lives of their biological children.[2] This fact further

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[1] Justice Kennard's concurring opinion, which also refuses to follow *Kelsey S.* because of Dawn's marital status (conc. opn. of Kennard, J., *ante*, at p. 4), is similarly unpersuasive.

[2] See *R.A.J.* v. *L.B.V.* (Ariz.Ct.App. 1991) 817 P.2d 37; *Willmon* v. *Hunter* (Ark. 1988) 761 S.W.2d 924; *R. McG.* v. *J. W.* (Colo. 1980) 615 P.2d 666; *Weidenbacher* v. *Duclos* (Conn. 1995) 661 A.2d 988; *Green* v. *Long* (Del. Fam.Ct. 1988) 547 A.2d 630; *Johnson* v. *Studley-Preston* (Idaho 1991) 812 P.2d 1216, 1219-1221; *Simcox* v. *Simcox* (Ill. 1989) 546 N.E.2d 609, 612; *In re Marriage of Slayton* (Ill.App.Ct. 1996) 660 N.E.2d 562; *K.S.* v. *R.S.* (Ind. 1996) 669 N.E.2d 399; *Smith* v. *Jones* (La.Ct.App. 1990) 566 So.2d 408; *Finnerty* v. *Boyett* (La.Ct.App. 1985) 469 So.2d 287; *Turner* v. *Whisted* (Md. 1992) 607 A.2d 935; *In re Paternity*

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demonstrates the unsoundness of the majority's conclusion.[1]

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of B.J.H. (Minn.Ct.App. 1998) 573 N.W.2d 99; *Kelly* v. *Cataldo* (Minn.Ct.App. 1992) 488 N.W.2d 822, 826-828; *Ivy* v. *Harrington* (Miss. 1994) 644 So.2d 1218; *J. M. L.* v. *C. L.* (Mo.Ct.App. 1976) 536 S.W.2d 944, 945-947; *Matter of Paternity of Adam* (Mont. 1995) 903 P.2d 207; *M.F.* v. *N.H.* (N.J. Super.Ct. App.Div. 1991) 599 A.2d 1297; *Richard W* v. *Roberta Y* (N.Y. App.Div. 1995) 629 N.Y.S.2d 512; *Gorton* v. *Gorton* (N.Y. Fam.Ct. 1984) 475 N.Y.S.2d 767; *Gregory* v. *McLemore* (Okla.Ct.App. 1995) 899 P.2d 1189; *In Interest of J.W.T.* (Tex. 1994) 872 S.W.2d 189; *McDaniels* v. *Carlson* (Wash. 1987) 738 P.2d 254; *In re Paternity of T.R.B.* (Wis.Ct.App. 1990) 454 N.W.2d 561; see also *C.C.* v. *A.B.* (Mass. 1990) 550 N.E.2d 365, 372, fn. 10 (leaving open possibility of action "where, due to the actions of the mother, [the natural father] ha[s] not yet formed a substantial relationship with the child"); *Stone*, *supra*, 474 S.E.2d at page 566 (leaving open possibility of action where natural father "proves that he would share in the care of, responsibility for, and support of the child but for the mother's repudiation").

[1] In her concurring opinion, Justice Kennard also overlooks this fact in declaring that "society has consistently *denied* to the biological father in these circumstances any opportunity to establish parental rights over the child of another man's wife." (Conc. (continued...)

Finally, in holding that Jerry has no constitutional liberty interest on the facts of this case, the majority creates a potential anomaly under California law. Under decisions of our appellate courts, despite Frank's status as the child's presumed father, Jerry possibly could be held liable some day for the financial support of the child with whom he now seeks to develop a relationship. (See *Alicia R.* v. *Timothy M.* (1994) 29 Cal.App.4th 1232 (*Alicia R.*); *County of Orange* v. *Leslie B.* (1993) 14 Cal.App.4th 976 (*Leslie B.*).) As a result, although in the majority's view the presumption prevents a biological father who seeks involvement in his child's life from even getting a hearing, under existing California precedent it may not prevent the state from later seeking financial support from that same father. The state may thus invoke the presumption to prevent a natural father from obtaining the benefits of fatherhood, but the same natural father may not be able to invoke it to avoid the financial burdens of fatherhood. This result seems contradictory and inequitable. In my view, a biological connection that is sufficient to establish a natural father's potential financial responsibility for his child should also give rise to a constitutional interest in the opportunity to develop a relationship with that child where, as here, the natural father promptly comes forward and demonstrates a full commitment to his parental responsibilities.[1]

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opn. of Kennard, J., *ante*, at p. 3, original italics.)

[1] The majority correctly notes that *Alicia R.* and *Leslie B.* are factually distinguishable from this case. (Maj. opn., *ante*, at p. 14.) However, the majority ignores the court's broad declaration in *Leslie B.* that the presumption of a husband's

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paternity "cannot be applied" to "*protect*[] [a natural father] from assuming any responsibility for a child he fathered." (*Leslie B.*, *supra*, 14 Cal.App.4th at p. 980, original italics; see also *id.* at p. 981 ["presumption was never intended as a financial prophylactic for men who have affairs with married women"].) The court reasoned that the presumption applies only where its underlying policies "would be furthered by [its] application . . . to the facts" of the particular case. (*Id.* at p. 980.) The court noted, for example, that we refused to apply the presumption in *Lisa R.*, *supra*, 13 Cal.3d 636, because, given the presumed father's death, the policy of protecting the family unit could not be served. (*Leslie B.*, *supra*, 14 Cal.App.4th at p. 981.) Of course, in this case, we cannot predict how the facts will later develop or whether a court will some day conclude, based on those facts, that Jerry is financially liable for Dawn's child.

C. *Due Process Entitles Jerry to a Hearing*

The state procedures at issue here extinguish Jerry's constitutional liberty interest in the opportunity to develop a relationship with his alleged natural child without affording him any opportunity to be heard. As we have explained, "the reasonableness of a statutory limitation on the right to offer proof of parentage depends on circumstances prevailing in each particular case." (*In re Lisa R.* (1975) 13 Cal.3d 636, 651, fn. 17 (*Lisa R.*) We must balance Jerry's constitutional liberty interest against the state's "interest in precluding [Jerry] from offering evidence of parentage . . . ." (*Id.* at p. 650; see also *Michael H.*, *supra*, 491 U.S. at p. 148 (dis. opn. of Brennan, J.) [due process requires consideration of state's "interest in curtailing the procedures accompanying the termination of a constitutionally protected interest"].) Among the factors that influence our determination are " 'the extent to which [Jerry] may be "condemned to suffer grievous loss," ' " and "the permanency of the threatened loss." (*Santosky* v. *Kramer* (1982) 455 U.S. 745, 758 (*Santosky*).)

1. *Jerry's Interest Is Substantial*

As I have already explained, the United States Supreme Court has considered the nature of a natural father's interest in his child several times. In those decisions, the high court has stressed that "[t]he rights to conceive and to raise one's children" are " 'essential' " and " 'far more precious . . . than property rights' [citation]." (*Stanley* v. *Illinois* (1972) 405 U.S. 645, 651 (*Stanley*).) In *Lehr*, describing the "significance" of a natural father's "biological connection," the court explained: "[I]t offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." (*Lehr*, *supra*, 463 U.S. at p. 262, fn. omitted.) Citing this passage from *Lehr*, we have observed that the high court decisions "reinforce[] the importance of genetic parents' rights. [Citations.]" (*Johnson* v. *Calvert* (1993) 5 Cal.4th 84, 98-99 (*Johnson*).)

More generally, in cases involving termination of parental rights, the high court has stated that a successful termination action "work[s] a unique kind of deprivation. [Citations.]" (*Lassiter* v. *Department of Social Services* (1981) 452 U.S. 18, 27 (*Lassiter*).) In this context, the court has declared that "a natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children" ' " is a "commanding" interest. (*Santosky*, *supra*, 455 U.S. at p. 758.) In a termination action, the state attempts " 'to destroy *permanently* all legal recognition of the parental relationship.' [Citation.]" (*M.L.B.* v. *S.L.J.* (1996) ___ U.S. ___ [117 S.Ct. 555, 570] (*M.L.B.*), italics added.) A successful termination action therefore "is 'irretrievabl[y] destructi[ve]' of the most fundamental family relationship.

[Citation.]" (*Id.* at p. ___ [117 S.Ct. at p. 566].) In short, "[f]ew forms of state action are both so severe and so irreversible." (*Santosky*, *supra*, 455 U.S. at p. 759; see also *M.L.B.*, *supra*, ___ U.S. at p. ___ [117 S.Ct. at p. 565] [" '[f]ew consequences of judicial action are so grave as the severance of natural family ties' "].) A termination decision that "effectively foreclose[s] the possibility" that a child will "ever know his natural parents" results in a "loss[] [that] cannot be measured." (*Santosky*, *supra*, 455 U.S. at pp. 760-761, fn. 11.) "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one. [Citation.]"[1] (*Lassiter*, *supra*, 452 U.S. at p. 27, fn. omitted.)

From Jerry's perspective, California's decision to extinguish his constitutional liberty interest in his potential relationship with his alleged biological child has the effect of a successful termination proceeding. It " 'destroy[s] permanently all legal recognition' " of his biological relationship to the child. (*M.L.B.*, *supra*, ___ U.S. at p. ___ [117 S.Ct. at p. 570].) Jerry's interest in this case, therefore, is substantial. Accordingly, the Legislature's refusal to afford him any process can withstand constitutional scrutiny only if California "has an interest so powerful that it justifies granting [him] *no* hearing before terminating his parental rights." (*Michael H.*, *supra*, 491 U.S. at p. 154, original italics (dis. opn. of Brennan, J.).)

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[1] The majority thus errs in discounting Jerry's interest in an accurate determination of paternity. (Maj. opn., *ante*, at p. 15, fn. 7.)

2. *The State's Interests Do Not Justify the Absence of Process*

Although the state interests Dawn invokes here—the child's welfare and family stability—are unquestionably significant, on the facts of this case, they do not justify extinguishing Jerry's constitutional liberty interest without affording him any process. As this court has previously observed, due process generally requires that an individual receive "notice and some form of hearing before" the state deprives him of a protected liberty interest. (*Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294, 308 (*Kash*).) In some circumstances, important governmental interests may justify postponing notice and hearing until after the deprivation. (*Ibid.*) However, even in these circumstances, "an opportunity to be heard may only be postponed, not entirely eliminated."[1] (*Kash, supra,* 19 Cal.3d at p. 308.) In the context of proceedings to terminate parental rights, the high court has explained: "[T]hat important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures." (*Santosky, supra,*

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[1] *Michael H.* does not constitute an exception to this rule. As I have previously explained, in concurring in the judgment in that case, Justice Stevens concluded that California's statutory scheme was "consistent with the Due Process Clause" (*Michael H., supra,* 491 U.S. at p. 136 (conc. opn. of Stevens, J.)) because it afforded the alleged natural father "a fair opportunity to show that he [was the child's] natural father" and that the child's "interests would be served by granting him visitation rights." (*Id.* at p. 135 (conc. opn. of Stevens, J.).)

455 U.S. at p. 754, fn. 7, original italics.) Similarly, in this case, that affording Jerry an opportunity to be heard might affect liberty interests of Dawn, Frank, and the child does not justify denying Jerry constitutionally adequate procedures.

Indeed, in previous cases involving parental rights, we have found the state's legitimate and substantial interest in the child's welfare insufficient to justify extinguishing a natural parent's right without a hearing or categorically impairing that right. In *Lisa R.*, we balanced state and private interests to determine whether an alleged natural father could be "denied the opportunity to be heard in protection of a basic [constitutional] right." (*Lisa R., supra,* 13 Cal.3d at p. 647.) We concluded that the state's legitimate interest in the child's welfare did not justify denying the natural father a hearing, noting that a court had to determine his parental fitness even if he established his biological paternity. (*Id.* at pp. 648-650 & fn. 14.) Similarly, in the case now before us, "it is important to keep in mind that the question at issue . . . is not whether [Jerry] should be granted visitation or custody but simply whether he can take the first step in any such proceeding." (*Michael H., supra,* 491 U.S. at p. 161, fn. 3 (dis. opn. of White, J.).) Jerry's constitutional liberty interest "only entitle[s] [him] to an opportunity to request to invoke his parental rights; . . . it would remain for [a] court to determine issues of visitation, custody, etc., based on the best interests of the child. [Citations.]"[1] (*Stone, supra,* 474 S.E.2d at p. 566.)

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[1] I refer to the "best interest" standard because of existing California family law statutes. (See § 7637 [judgment in paternity action may address any matter in child's "best interest," including custody and visitation issues].)

In *Kelsey S.*, we again considered the extent to which the state's interest in the child's welfare may justify categorically impairing a natural father's constitutional rights. There, we held that the state may not constitutionally authorize an adoption over the objection of a natural father who demonstrates a full commitment to his parental responsibilities, absent a showing of his unfitness. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 821.) In reaching this conclusion, we rejected the notion that the state's interest in placing the child with an adoptive couple, rather than with the natural father, justified adoption without the natural father's consent. We explained: "[T]he constitutionally valid objective is the protection of the child's well-being. We cannot conclude in the abstract that *adoption* is itself a sufficient objective to allow the state to take whatever measures it deems appropriate. *Nor can we merely assume, either as a policy or factual matter, that adoption is necessarily in a child's best interest*. This assumption is especially untenable in light of the rapidly changing concept of family." (*Id.* at p. 845, second italics added.)

Here, too, we cannot "merely assume, either as a policy or factual matter," that simply because Dawn was married at the time of the child's conception and birth, Jerry's exclusion from the child's life "is necessarily in [the] child's best interest." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 845.) There may very well be circumstances in which allowing contact with the natural father will be in the child's best interest, even where a presumed father existed at the time of the child's birth.[1] Thus, assuming that Jerry

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[1] For example, exclusion of the natural father may not be in the child's best interest where the mother intends to leave her husband soon after the

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is the child's natural father, a court must make an individualized determination of the child's best interest in determining the extent, if any, of Jerry's parental rights. (See *Stanley*, *supra*, 405 U.S. at p. 656 [state may not justify denying alleged natural father a hearing by asserting that unmarried fathers are seldom fit].)

Nor does the state's interest in family stability justify denying Jerry constitutionally adequate procedures. "Not all petitions challenging the paternity of marital children threaten" this state interest. (*Stone*, *supra*, 474 S.E.2d at p. 565.) As I have explained, in determining whether the state may constitutionally deny an alleged natural father an opportunity to assert his claim, we must consider the "circumstances prevailing in each particular case." (*Lisa R.*, *supra*, 13 Cal.3d at p. 651, fn. 17.) In this case, as previously noted, Dawn continued to have contact with Frank during the three-month period she openly lived with Jerry, so Frank "was well aware of the liaison between [Dawn] and [Jerry]." (*Michael H.*, *supra*, 491 U.S. at p. 162 (dis. opn. of White, J.).) Because Frank probably "already knows the child is not his, [it is] less likely that the paternity hearing will disrupt an otherwise harmonious and apparently exclusive marital relationship." (*Michael H.*, *supra*, 491 U.S. at p. 120, fn. 1 (plur. opn. of Scalia, J.); see also *Michael M.* v. *Giovanna F.* (1992) 5 Cal.App.4th 1272, 1284 [no threat to family unity where man and pregnant woman marry knowing that another man is the unborn child's biological father]; *In Interest of J.W.T.*, *supra*, 872 S.W.2d at p. 197 [state's interest in family stability diminished given mother's choice " 'to engage in sexual relations outside of

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child's birth, or where the husband ceases to have contact with the mother and the child, or is abusive, or is incarcerated for an extended period.

marriage' "].) As also previously noted, Jerry submitted evidence that Dawn initially intended to marry him and raise children with him, and that he took action in anticipation of these events. In previous cases involving conflicting claims of parentage, we have given controlling weight to the "acted-on intention" of the parties to have a child. (*Johnson*, *supra*, 5 Cal.4th at p. 93.) Accordingly, on the facts of this case, the state's interest in family stability does not justify extinguishing Jerry's constitutional liberty interest without affording him an opportunity to be heard. A court's ability, and obligation, to consider the potential impact on the marital family in determining Jerry's custody and visitation request are adequate to protect the state's interest in family stability. (See *Stone*, *supra*, 474 S.E.2d at pp. 566-567; see also *Boddie* v. *Connecticut* (1971) 401 U.S. 371, 381 (*Boddie*) [complete denial of due process is impermissible where "alternatives exist" to protect state's interests].)

D. *The State Has Considerable Discretion Regarding the Form of Hearing*

My conclusion that Jerry has a constitutional right that entitles him to due process gives rise to the question of precisely what process is due. "Due process of law guarantees 'no particular form of procedure . . . .' " (*Mitchell* v. *W. T. Grant Co.* (1974) 416 U.S. 600, 610.) Rather, as noted, we use "a weighing process" to determine "the form of hearing required . . . ." (*Roth*, *supra*, 408 U.S. at p. 570, italics omitted.) Thus, "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved . . . ." (*Boddie*, *supra*, 401 U.S. at p. 378.)

Although the constitutional right Jerry asserts here is essentially of the same type and magnitude as the right that the natural father asserted in *Kelsey S.*, the countervailing interests in this case are more substantial than in the latter case. First, the natural father in *Kelsey*

S. had a constitutional right that the prospective adoptive parents did not have. He therefore had a constitutional priority that the state could not extinguish absent a showing of unfitness. (*Kelsey S., supra*, 1 Cal.4th at p. 849.) Here, Jerry enjoys no constitutional priority. An exercise of his right necessarily conflicts with the right of Dawn and Frank to form a family unit and raise the child as they see fit. (See *Stanley, supra*, 405 U.S. at p. 651 [due process clause protects the "integrity of the family unit"].) Moreover, the natural father in *Kelsey S.* sought sole custody of the child, i.e., a unified, although perhaps single parent, family. By contrast, Jerry seeks only legal custody and visitation. The state has a strong interest in fostering, at the outset of a child's life, a unified family with a single father. Thus, the state's preference that the father be the man who is married to the mother rather than the natural father is not arbitrary or irrational. Furthermore, although Jerry's opportunity interest is significant, it is less weighty than the interest of an unmarried father who has already formed a relational bond with the child. (See *Lehr, supra*, 463 U.S. at p. 262, fn. 18 [father who has played substantial role in child's rearing has "greater claim to constitutional protection" than "mere biological parent"].)

Therefore, although alleged natural fathers like Jerry have the right to some form of process, given the competing interests, the state has considerable leeway to build into that process a preference for the presumed father as the child's sole father. Not only may the state deny the natural father visitation or custody based on the child's best interest (see § 7637), it may, for example, establish a rebuttable presumption that giving sole custody to the mother and presumed father, and denying any rights to a natural father who is not the presumed father, best serves a newborn child's interests. Moreover, the state has considerable discretion to prescribe the procedure, including the applicable standard of proof, governing an

alleged natural father's attempt to rebut that presumption. Even absent a statute, the child's interest in family stability and unity would justify in many, and perhaps most, circumstances a court's decision to deny the natural father any access to a child who resides in a reasonably stable two-parent home consisting of the mother and presumed father.

However, as I have explained, no credible state interest justifies completely denying the natural father an opportunity to rebut an explicit or implicit presumption in favor of the presumed father—for example, to show by clear and convincing evidence that no stable family unit exists, or that the mother and presumed father do not meet certain basic standards of fitness. A denial of this minimal due process disregards the natural father's constitutional right without advancing a legitimate government interest in the child's welfare.

Finally, the state also has considerable flexibility in designing procedures to protect the privacy and other interests of the parties. As a majority of the high court held in *Michael H.*, "[i]t is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration." (*Michael H., supra,* 491 U.S. at p. 126 (plur. opn. of Scalia, J.); see also *id.* at pp. 132-133 (conc. opn. of Stevens, J.).) Thus, the state may, for example, provide for an in camera hearing during which an alleged father must first show that, assuming his biological paternity, granting him any relief or legal right would be in the child's best interests. If he does not make this preliminary showing, he could not proceed to establish his paternity. (See *Stone*, *supra*, 474 S.E.2d at pp. 567-568; see also *Weidenbacher* v. *Duclos*, *supra*, 661 A.2d at p. 1000 [court must make preliminary determination regarding child's best interest].) The state also may require expeditious adjudication of these issues, so as to minimize disruption to the child's life. In short, the state

may constitutionally establish procedures that promote the stability of the traditional family unit.

III. CONCLUSION

In finding that Jerry is constitutionally entitled to some form of process under the facts of this case, I "do not intend, in any way, to denigrate the importance of the traditional family unit or the institution of marriage. To the contrary, [I] continue to believe that the family provides the foundation upon which our society is built and through which its most cherished values are best transmitted. [My view] of this case merely recognizes the reality that nontraditional living arrangements do exist, that recognized liberty interests can arise from such arrangements, and that furtherance of the State's interest in preserving family and marital stability does not require an absolute bar to the rights of putative natural fathers." (*Stone*, *supra*, 474 S.E.2d at p. 569.) Therefore, I would affirm the judgment of the Court of Appeal denying the petition for writ of mandate.

CHIN, J.

I CONCUR:

MOSK, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.
Unpublished Opinion XXX no opn. - 4th Dist., Div. 2 - ptn. summarily denied by order
Original Appeal
Original Proceeding
Review Granted XXX
Rehearing Granted
Opinion No. S060966
Date Filed: April 6, 1998
Court: Superior
County: Riverside
Judge: William A. Anderson, Jr., Commissioner
Attorneys for Appellant:
Sharon J. Waters, Diane Catran Roth and Andrew I. Roth for Petitioner.
Attorneys for Respondent:
William C. Katzenstein, County Counsel, Robert M. Pepper, Principal Deputy County Counsel, and Lucy J. Furuta, Deputy County Counsel, for Respondent.
Lawrence J. La Rocca and Marjorie G. Fuller for Real Party in Interest.

Appendix C

RIVERSIDE CONSOLIDATED
SUPERIOR/MUNICIPAL COURTS
MINUTE ORDER

Case No.:157628Date: 07/01/98
DEPT: F3

JERRY KRCHMAR/Plaintiff

Atty: HENRY JAMES KOEHLER IV
DAWN ELIZABETH DEZERN/Defendant
Atty: LINDA R. OKESON

Hearing: Hearing re: Custody/Visitation ONLY filed by JERRY KRCHMAR

****
8:39, 11:38

Commissioner William A. Anderson, Jr.
CLERK: Sharon Jones
Rep: Tina Maskew
Stipulation to appoint Court Commissioner to hear matter as Judge Pro Tem.

JERRY KRCHMAR present in court represented by Henry James Koehler.

DAWN ELIZABETH DEZERN not present in court represented by Linda Okeson.

Issues argued by both sides.

The Court recessed the matter in order to review the moving papers and responsive papers.

At 11:38 the following proceedings were heard:

Parties and counsel present in court as previously indicated.

The Court announced it Tentative Decision to deny the motion for a hearing on visitation.
Issues argued by both sides.

Prior counsel Lawrence La Rocca was sworn and examined regarding whether he signed a Substitution of Attorney form.

THE COURT MAKES THE FOLLOWING ORDERS:
The motion for a hearing on visitation is denied.
Issue of sanctions and attorney

fees and costs taken under submission.

Petitioner's attorney shall file Points and Authorities in opposition to the sanctions and attorney fees request by 5:00 pm on 7-8-98.

Matter deemed submitted an 7-8-98 at 5:00 pm